

Competitive Sourcing of Environmental Services in the  
Air Force  
How Far Can They Go

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## I. Introduction

The views expressed in this article are those of the author and do not reflect the official policy or position of the United States Air Force, Department of Defense, or the U.S. Government.

The purpose of this thesis is to examine the legal basis for the current ban on competitive sourcing<sup>1</sup> of inherently governmental activities to determine whether and how far the Air Force can go to outsource environmental services. This policy is currently enshrined in Office of Management and Budget (OMB) Circular A-76 which bans the competitive sourcing of inherently governmental functions.<sup>2</sup> While subjecting federal government activities to private sector

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<sup>1</sup> The Federal Acquisition Regulation distinguishes between the terms "competitive sourcing", "outsourcing" and "privatization." "Competitive sourcing" involves holding competitions between private sector companies and federal organizations to determine who can best provide goods or services. "Outsourcing" assumes upfront that the private sector is the better provider. Here, federal organizations don't compete to provide services. "Privatization" concerns the wholesale transfer of assets and/or responsibility to the private sector. FEDERAL ACQUISITION COUNCIL, MANAGER'S GUIDE TO COMPETITIVE SOURCING, Second Edition 28 (2004).

<sup>2</sup> See OMB Circular No. A-76, *Performance of Commercial Activities*, 68 Fed. Reg. 32,134 (Revised May 29, 2003) [hereinafter OMB Circular A-76] available at [http://www.whitehouse.gov/omb/circulars/a076/a76\\_incl\\_tech\\_correction.pdf](http://www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.pdf). See also Technical Correction to OMB Circular No. A-76, *Performance of Commercial Activities*, 68 Fed. Reg. 48,961 (August 15, 2003). This circular has been made applicable to the DoD by 32 C.F.R. § 169(a).15(d)(2003).

competition is appealing to the Bush Administration,<sup>3</sup> the question arises as to whether federal officials will go too far.<sup>4</sup>

While a host of environmental functions are undoubtedly suitable for competitive sourcing, the successful performance of many environmental functions requires the long term exercise of considerable expertise, skill and judgment. Determining which of these functions crosses the line from commercial in nature to inherently governmental, and thus, exempt from competitive sourcing, is often difficult and subject to wrangling.

Before applying the concept of inherently governmental functions to particular environmental matters, the analysis pauses to consider the legal bases for the ban on competing inherently governmental functions. While OMB has enshrined the ban within its Revised A-76 Circular, the question arises as to whether the ban has any constitutional or statutory basis. Since the U.S. Constitution is the fundamental law of the land, the analysis begins by looking at the constitutional underpinnings of the ban, implicating

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<sup>3</sup> See OFFICE OF MANAGEMENT & BUDGET, PRESIDENT'S MANAGEMENT AGENDA, FISCAL YEAR 2002, at [http://www.whitehouse.gov/\\_omb/budget/\\_fy2002/mgmt.pdf](http://www.whitehouse.gov/_omb/budget/_fy2002/mgmt.pdf).

<sup>4</sup> See generally Brian Joseph Godard, *Inherently Governmental Functions: Ensuring That Contractors Do Not Perform Such Functions* (2000) (unpublished LL.M. thesis, Geo. Wash. U. Law.) (on file with the Geo. Wash. U. Law School Library).

an analysis of the Appointments clause. This analysis shows that this clause provides little basis for restricting competitive sourcing.

The analysis then turns to Federal Activities Inventory Reform Act of 1998 (FAIR)<sup>5</sup> to determine whether and to what extent Congress has statutorily proscribed the discretion of Air Force officials to compete Air Force activities. This analysis shows that Congress statutorily defined inherently governmental functions in the FAIR Act without mandating that federal employees carry out such functions. In fact, while Congress has prohibited competitive sourcing in some specific areas, Congress has refrained from enacting a general statutory ban on competing inherently governmental functions.

With few statutory restrictions to competitive sourcing,<sup>6</sup> Congress has given the executive branch considerable discretion to define the ban on outsourcing of inherently governmental functions. Consequently, the analysis turns to OMB's Revised Circular No. A-76. To implement the FAIR Act, OMB has issued guidance

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<sup>5</sup> The Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (codified at 31 U.S.C. § 501 note (2002)).

<sup>6</sup> See John Cibinic & Ralph C. Nash, *Contracting Out Procurement Functions: The "Inherently Governmental Function" Exception*, 14 Nash & Cibinic Report 45 (2000). At 46, Mssrs. Cibinic and Nash state "we have been unable to find any clear-cut judicial or statutory statement prohibiting outsourcing such functions."

"clarifying" the definition of inherently governmental functions in the FAIR Act. While OMB does not acknowledge a major break from its prior definition of inherently governmental functions,<sup>7</sup> OMB's revised guidance substantially narrows the list of activities which are inherently governmental. Arguably, the current OMB definition goes too far--providing a mechanism for competitive sourcing of federal activities which are inherently governmental.

Given the threat which competitive sourcing poses for the jobs of federal employees, federal employees are naturally interested in challenging competitive sourcing. Consequently, the analysis turns to examine how the courts have dealt with these challenges. This analysis shows that the Courts and the General Accountability Office (GAO) are unlikely to overturn competitive sourcing decisions on the grounds that the federal agency has violated OMB's ban on competing inherently governmental functions. The FAIR Act also provides a potential mechanism for federal employees to challenge agency decisions which classify federal positions as commercial. While the Courts have not yet addressed this type of challenge, the FAIR Act provides for appeals to such decisions only to agency officials.

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<sup>7</sup> See OMB Circular A-76, *supra* note 2.



Most likely, judges will exercise deference to these agency decisions.

With a dearth of guidance concerning the nature and contours of the definition of inherently governmental functions, the analysis shifts to an area of law which has dealt a great deal with this concept but in a different legal context: litigation involving the application of the discretionary function exception to bar claims raised against the United States under the Federal Tort Claims Act.<sup>8</sup>

The concept of "discretionary function" as understood within the contours of the discretionary function exception substantially overlaps with the concept of inherently governmental functions as defined by the FAIR Act and OMB's revised guidance. While discussion of the concept of discretionary functions as applied in the FTCA is pure dicta in the competitive sourcing arena, this discussion provides healthy insight into the cloudy world of inherently governmental functions. Taken as a whole, the decisions discussing the discretionary function exception show the innate difficulty of defining the concept with precision but they also show that discretionary

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<sup>8</sup> 60 Stat. 843, 28 U.S.C. §§ 1291, 1346, 1402, 2401, 2402, 2411, 2412 2671-2680 [Title IV of the Legislative Reorganization Act of 1946, 79<sup>th</sup> Cong., 2d Sess., Act of August 2, 1946, §§ 401-424.

governmental functions lurk in a host of government activities, even ministerial ones. Consequently, case law centering upon the discretionary function exception provides intellectual firepower for those attempting to expand the range of governmental functions regarded as inherently governmental.

In the final sections, the analysis shifts to the application of the concept of inherently governmental functions to several environmental activities; namely, 1) implementation of the Sikes Act, which governs natural resource management; 2) preparation of environmental impact statements by contractors under the National Environmental Policy Act (NEPA); 3) general management and operation of environmental programs, i.e. the running of an emissions program and/or wastewater plant; and 4) rendering of legal advice on environmental matters.

While lack of standing remains a frustrating obstacle for federal employees seeking to challenge Circular A-76 competitions, a public employee group, Public Employees for Environmental Responsibility, has recently challenged the outsourcing of environmental positions by the Air Force by alleging that the Sikes Act prohibits outsourcing of natural resource management positions. While the outcome of this case is far from certain, the court's rulings on

preliminary motions suggest that suits by public employees under the Sikes Act will survive standing and other jurisdictional challenges. As a result, the Sikes Act will probably provide public employees with a meaningful legal avenue to judicially challenge agency decisions regarding the competitive sourcing of at least some environmental decisions by the Air Force, those concerning the management of natural resources.

Court rulings regarding the extent to which federal agencies can delegate preparation of environmental impact statements to contractors show that judges have been willing to approve the delegation of a great deal of agency responsibility under NEPA to contractors. The cases show, however, that federal agencies who abuse this discretion by "rubberstamping" their statutory obligation to provide meaningful guidance and independent review could find an angry judge willing to stop a project in its tracks.

In the environmental context, potentially inherently governmental activities inevitably arise in even relatively ministerial environmental activities. As a result, Air Force decisions classifying particular environmental positions as inherently governmental or commercial are vulnerable to endless quibbling. Given this state of affairs, the discussion shifts to presenting a practical

approach to competing environmental positions which maximizes the freedom of Air Force officials to compete environmental positions while satisfying OMB's edict to retain inherently governmental positions in-house.

Since just about no government job is safe in this brave new world of competitive sourcing, the analysis shifts to the most sacred of sacred cows: lawyers' jobs. Given OMB's revised guidance, this analysis shows that no legal obstacles currently prevent the Air Force from outsourcing the jobs of environmental lawyers. While commanders may find it strange or relatively impractical to call a private firm whenever an environmental question arises, OMB has laid the legal foundation for allowing it to happen.

Lastly, the analysis shows that the dominant player in any forthcoming battles regarding inherently governmental functions is OMB. He or she who controls OMB will most likely have the greatest influence on the multitude of competitions to come. With the Supreme Court interpreting the Constitution flexibly, the Appointments clause provides no constitutional restraints to competing environmental positions. Congress has also refrained from exerting its power to restrain OMB with Congress giving OMB considerable discretion to shape procurement policy concerning competitive sourcing. In addition, Congress has also been

unwilling (as yet) to statutorily overturn the decisions of federal courts refusing to grant federal employees standing to challenge competitive sourcing decisions.

## **II. The Air Force Environmental Program**

The United States Air Force is highly decentralized with over 100 major bases spread throughout the globe. Many of these bases are essentially towns unto themselves capable of providing the full range of services necessary to maintain large communities of people. Often, Air Force personnel will live, shop and work within the boundaries of these bases with little need to go off base. These Air Force communities also serve as custodians of significant federal lands entrusted to the Air Force.

Under the direction of the base commander, personnel of Civil Engineering Squadrons typically assume primary responsibility for the maintenance and upkeep of these bases including infrastructure, i.e. heat, water, roads, on the base. As part of their mission, commanders at all levels are responsible for full compliance with national and Air Force environmental policy.<sup>9</sup> Commanders are responsible for assuring Air Force compliance with

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<sup>9</sup> AFPD 32-70, Environmental Quality, 20 July 1994. This policy directive broadly articulates Air Force environmental policy at <http://www.e-publishing.af.mil/pubfiles/af/32/afpd32-70/afpd32-70.pdf>.

applicable federal, state and local environmental laws and regulations.<sup>10</sup> These Air Force officials are also obligated to comply with a panoply of environmental regulations promulgated by the Department of Defense and the Department of the Air Force.<sup>11</sup>

The Air Force environmental program has four pillars: clean-up, compliance, conservation, and pollution prevention<sup>12</sup>-with the range of environmental services provided at a particular base varying with the needs of that base. Typical programs include restoration of Superfund sites,<sup>13</sup> management and disposal of solid and hazardous waste,<sup>14</sup> air compliance,<sup>15</sup> wastewater management,<sup>16</sup> storm water management, pollution prevention,<sup>17</sup> NEPA analyses for proposed actions,<sup>18</sup> and developing,

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<sup>10</sup> *Id.*

<sup>11</sup> The Department of Defense electronically posts its directives, instructions, regulations and manuals, which are available at <http://www.dtic.mil/whs/directives>.

<sup>12</sup> AFPD 32-70, Environmental Quality, 20 July 1994.

<sup>13</sup> See AFI 32-7020, Environmental Restoration Program, February 7, 2001.

<sup>14</sup> See AFI 32-7020, Solid and Hazardous Waste Compliance, May 12, 1994 and AFI 32-7086, Hazardous Materials Management, August 1, 1997.

<sup>15</sup> See AFI 32-7040, Air Quality Compliance, May 9, 1994.

<sup>16</sup> See AFI 32-7041, Water Quality Compliance, December 10, 2003.

<sup>17</sup> See AFI 32-7080, Pollution Prevention Program, May 12, 1994.

<sup>18</sup> See AFI 32-7061, The Environmental Impact Analysis Process, March 12, 2003, and 32 C.F.R. § 989 (2003).

implementing and enforcing natural and cultural resource plans.<sup>19</sup>

Base commanders turn to their Civil Engineering Squadrons to run base environmental programs. Civil Engineering Squadrons typically include environmental services personnel comprised of active duty, federal civilian employees and contractors, all responsible for performing the myriad duties involved in implementing national environmental policy at Air Force installations.<sup>20</sup>

Responding to the FAIR Act's provisions, the Air Force has inventoried its environmental positions, which are currently held by civilian federal employees.<sup>21</sup> This data doesn't include those positions already held by contractors and their employees. As of fiscal year 2003, the Air Force reports 2,135 environmental positions,<sup>22</sup> of which 716 have

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<sup>19</sup> See AFI 32-7064, Integrated Natural Resources Management, August 1, 1997; AFI 32-7065, Cultural Resources Management Program, June 1, 2004.

<sup>20</sup> *Id.*

<sup>21</sup> See at <http://web.lmi.org/fairnet/select.cfm>, [hereinafter FAIRNET] for current year data. The categories of activities are as follows: E110 Management Headquarters - Environmental Security; E120 Environmental and Natural Resource Services; E220 Safety; E225 Occupational Health Services; E230 Explosives Safety; E250 Response to Hazardous Material Mishaps; E999 Other Environmental Security Activities. The DoD publishes notice of availability of this information in the Federal Register. See also Notice of Public Availability of Fiscal Year (FY) 2003 Agency Inventories Under the Federal Activities Inventory Reform Act of 1998 (Public Law 105-270) ("FAIR Act"), 69 Fed. Reg. 30,341 (May 27, 2004).

<sup>22</sup> *Id.* For the prior year, FY 2002, the Air Force FAIR Act inventory reported 2,128 environmental positions of which 716 had been classified as commercial and 1412 as inherently governmental.

been classified as commercial and 1419 have been classified as inherently governmental, meaning these positions are not subject to competitive sourcing.<sup>23</sup>

Of those positions classified as commercial, the great bulk of positions, totaling 539,<sup>24</sup> fall in a category DoD classifies as environmental and natural resources positions, otherwise known as Sikes Act positions. Another 149 commercial positions are classified as safety, while 28 commercial positions are classified as management headquarters--environmental security.

Of the 1412 environmental positions the Air Force has classified as inherently governmental, 156 are management-headquarters positions,<sup>25</sup> 975 are environmental and natural resource positions<sup>26</sup> and 281 are environmental safety positions.<sup>27</sup>

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<sup>23</sup> This data doesn't include active duty personnel performing environmental duties. The FAIR Act doesn't require the Air Force to inventory the activities of uniformed members.

<sup>24</sup> FAIRNET, *supra* note 21. Hill AFB has the largest number of employees in this category, 50.

<sup>25</sup> *Id.* The largest bases in this category are Langley AFB with 61, Peterson AFB with 23 and Wright-Patterson with 15.

<sup>26</sup> *Id.* The largest bases in this category are Brooks AFB with 120, Andrews AFB with 57, and Elmendorf with 40.

<sup>27</sup> *Id.* The largest bases in this category are Vandenberg AFB with 40 and Kirtland AFB with 27.



The Air Force reports no civilian employees in several categories with environmental implications; namely, occupational health services (contains bioenvironmental) (E225), explosives safety (E230), response to hazardous material mishaps, other environmental security activities (E999) and collection and disposal of hazardous material (HAZMAT) (S430). Given existing medical facilities at just about every Air Force base, occupational health services are likely subsumed in a medical activity.

The absence of positions for those responding to hazardous material mishaps implies that these duties are being performed entirely by active duty personnel or by contractors. Arguably, one could classify a responder to hazardous material mishaps as a firefighter given the combustible nature of many hazardous materials. In the Air Force, active duty firefighters typically provide the bulk of the first responders to any hazardous material spill.<sup>28</sup> Federal law prohibits the competitive sourcing of firefighting duties with certain exceptions.<sup>29</sup> The Air

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<sup>28</sup> AFPD 32-20, Fire Emergency Services, August 5, 1993, ¶ 2 directs that Air Force commanders will have capabilities to provide a range of fire emergency services including response to mitigate the impact of hazardous material accidents (including intentional or accidental releases of industrial materials and chemical, biological or radiological environments).

<sup>29</sup> 10 U.S.C. § 2465 (2003). The prohibition does not apply to contracts to be carried outside the United States, contracts to be carried out on a government-owned but privately operated installation, contracts or

Force reports 2639 fire prevention civilian positions, of which 2,595 have been classified as commercial while 44 have been classified as inherently governmental.<sup>30</sup>

### **III. Competitive Sourcing**

At a June 2000 campaign rally, then candidate George Bush promised to overhaul government operations by competing the jobs of 425,000 federal workers.<sup>31</sup> Upon President Bush's taking office, the President identified competitive sourcing as one initiative of the President's Management Agenda (PMA), a plan to reform the federal government by making it citizen-centered, results-oriented, and market-based.<sup>32</sup> While some have criticized

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renewal of a contract for performance of a function under contract on September 24, 1983, and contracts for a period of less than one year which cover only the performance of firefighting functions that, in the absence of the contract, would have to be performed by members of the armed forces who are not readily available to perform such functions by reason of deployment.

<sup>30</sup> FAIRNET, *supra* note 21. The 2003 inventory of these positions reports that 2,386 positions classified are currently being performed by federal employees, but a review is pending regarding force restructuring decisions (i.e. base closure, realignment, consolidation).

<sup>31</sup> Jason Peckinbaugh, *Agencies Put Thousands of Jobs Up For Competition*, March 31, 2003 at <http://govexec.com/dailyfed/0303/033103p2.htm>. The Bush Administration has backed down from the goal of competing 425,000 federal jobs. See OFFICE OF MANAGEMENT AND BUDGET, COMPETITIVE SOURCING: CONDUCTING PUBLIC COMPETITION IN A REASONED AND RESPONSIBLE MANNER 4 (2003).

<sup>32</sup> Letter by Office of Management & Budget, *New Guide Released to Support the Successful Management of Competitive Sourcing*, (2004-06, March 5, 2004) available at <http://www.results.gov>. In 2002, OMB published the President's Management Agenda. See generally, OFFICE OF

the federal government's President's competitive sourcing initiative,<sup>33</sup> OMB lauds the big savings expected to result from it.<sup>34</sup>

While competitive sourcing is a new experience for some federal agencies, Congress had previously directed the DoD to procure supplies and services from the private sector if that sector could provide the supplies or services at a cost lower than the cost of in-house performance.<sup>35</sup> Consequently, the DoD has had an extensive competitive sourcing program in place for years.<sup>36</sup> DoD anticipates savings or cost avoidance of more than \$9

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MANAGEMENT & BUDGET, PRESIDENT'S MANAGEMENT AGENDA, FISCAL YEAR 2002, available at [http://www.whitehouse.gov/omb/\\_budget/fy2002/mgmt.pdf](http://www.whitehouse.gov/omb/_budget/fy2002/mgmt.pdf).

<sup>33</sup> See Steven L. Schooner, *Competitive Sourcing Policy: More Sail Than Rudder?* 33 PUB. CONT. L. J. 263 (2004). At 263, Professor Schooner states: "I fear that, without drastic change, the Bush Administration's competitive sourcing initiative is doomed to fail."

<sup>34</sup> Memorandum, "Big Savings Expected from Competitive Sourcing Initiative," from the Office of Management and Budget, (May 29, 2003), at [www.omb.gov](http://www.omb.gov). In this memorandum, OMB Director Mitchell E. Daniels, Jr. trumpets its Competitive Sourcing Initiative. "For quality service at the best price, competition beats monopoly every time. It is an established fact that fair competition can save taxpayers an average of 30 percent, whether the work is ultimately done in-house or by outsiders. Whoever wins the competitions, we can be confident that taxpayers will."

<sup>35</sup> 10 U.S.C. § 2462(a)(2003).

<sup>36</sup> GENERAL ACCOUNTING OFFICE, GREATER EMPHASIS NEEDED ON INCREASING EFFICIENCY AND IMPROVING PERFORMANCE, GAO-04-367 (2004). See also Major Mary E. Harney, *The Quiet Revolution: Downsizing, Outsourcing, and Best Value*, 158 MIL. L. REV. 48 (1998).

billion from competitions completed from 2000 through 2004.<sup>37</sup>

To further implement the President's initiative, the Air Force has run or plans to run A-76 competitions between its Civil Engineering Squadrons and private contractors to determine who will deliver environmental services at Air Force Bases.<sup>38</sup> When contracting out a function, the Air Force desires to transfer as much management responsibility as required to oversee execution of the work.<sup>39</sup> The goal is to harness the power of competition to improve quality, performance and lower costs to the government.<sup>40</sup> In FY 2003, no Department of Defense competitions, however were conducted or announced under the most recently revised Circular.<sup>41</sup>

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<sup>37</sup> *Id.* at 13.

<sup>38</sup> Data Supplied to Author by Air Force Civil Engineering Squadron (AFCESA) (February 10, 2004) (on file with author). AFCESA reports completed or planned competitions for environmental management services at Eglin AFB, Kirtland AFB, Robins AFB, Tinker AFB, and Wright-Patterson AFB. The Air Force has been holding competitive sourcing competitions for years.

<sup>39</sup> *Id.* at 1.

<sup>40</sup> OFFICE OF THE CIVIL ENGINEER, FACILITIES COMPETITIVE SOURCING AND PRIVATIZATION DIVISION, HEADQUARTERS UNITED STATES AIR FORCE, COMPETITIVE SOURCING AND PRIVATIZATION STRATEGY 2 (January 1999).

<sup>41</sup> OFFICE OF MANAGEMENT & BUDGET, COMPETITIVE SOURCING: REPORT ON COMPETITIVE SOURCING RESULTS FY 2003 6 (2004) at [http://www.whitehouse.gov/omb/pubpress/fy2004/cs\\_omb\\_647\\_report.pdf](http://www.whitehouse.gov/omb/pubpress/fy2004/cs_omb_647_report.pdf). Section 335 of P.L. 108-136 required the Department of Defense to delay use of the Circular's revisions until 45 days after reporting to Congress on their impact and DOD's plan for implementation. DOD transmitted its report to Congress on February 24, 2004.

At the heart of this process is the idea of competition, not just competition among private firms but competition among and between private and government organizations. The current A-76 circular provides the basic framework for inviting private and government organizations to compete to provide environmental services on Air Force bases. The current Circular A-76 pronounces that "the longstanding policy of the federal government has been to rely on the private sector for needed commercial services."<sup>42</sup> With every A-76 competition, the Air Force invites private companies to compete against the current Air Force governmental organization currently providing services. This governmental organization is called the most efficient organization (MEO).<sup>43</sup>

The A-76 circular provides rules for comparing these very different organizations to ensure fair competition. To begin the competitive process, Air Force officials will write a performance work statement (PWS), describing in detail the services to be performed.<sup>44</sup> After completing the PWS, Air Force officials will publish a solicitation

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<sup>42</sup> OMB Circular A-76, *supra* note 2.

<sup>43</sup> *Id.* at Attachment B-10.

<sup>44</sup> *Id.* at Attachment B-7.

notifying all potential bidders of the competition.<sup>45</sup> As part of the solicitation, the Air Force will identify the factors the Air Force will use to evaluate bids. Typical evaluation factors include demonstrated understanding of the government's requirements, technical approach, management capabilities, personnel qualifications, and cost.<sup>46</sup>

Similar to procedures used in FAR Part 15, the Air Force will also declare how it will evaluate the relative importance of these factors in the solicitation. Lowest price will not always win. If specified in the solicitation, Air Force officials are free to trade-off cost or price against other factors, but the specific weight given to cost or price must be at least equal to all other evaluation factors combined.<sup>47</sup> At the conclusion of the evaluation process, the Air Force makes a final decision on whether and to whom to award the contract. By running these competitions, the Air Force has extracted significant cost savings from contractors or existing government organizations.

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<sup>45</sup> *Id.* at Attachment B-7.

<sup>46</sup> *Id.* at Attachment B-3(a).

<sup>47</sup> *Id.* at Attachment B-3(b). The exception to this general rule occurs when the Air Force can devise quantifiable performance measures to assess value and to provide a means to be independently evaluated.

#### **IV. The U.S. Constitution**

##### **A. The Appointments Clause--Background**

While the concept of inherently governmental functions appears deeply rooted in the American political tradition, its legal basis is not clear. For those desiring to challenge competitive sourcing, the question arises as to whether the ban on competitive sourcing of inherently governmental functions has any constitutional or other legal roots.<sup>48</sup>

Our history informs us that the founding fathers were very concerned about who exercised what power. Concerned with protecting liberty, the founding fathers envisioned a government wherein the sovereign powers of the government were divided among the judiciary, legislature and executive. The text of the Constitution reflects the idea that each branch of government has a separate sphere of power which the Constitution would protect from encroachment, famously known as the separation of powers.

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<sup>48</sup> Dan Guttman, *Governance by Contract: Constitutional Visions; Time For Reflection and Choice*, 52 Admin. L. Rev. 859, 862 (2000). In discussing government "reforms" intended to outsource more federal work, Mr. Guttman argues that "as Big Government's programs and budgets grew, new work necessarily flowed to private parties. There was tacit bipartisan understanding, however, that the philosophical and Constitutional questions raised by reform would not be squarely and publicly addressed."

Since the founding fathers regarded the legislature as the branch most likely to encroach on the powers of the other branches, the founding fathers restricted the power of Congress to making laws while granting the executive power to the President. Consequently, the Constitution explicitly grants full executive power to the President. The Constitution states "[t]he executive power shall be vested in a President of the United States of America."<sup>49</sup> Likewise, the President shall also serve as commander-in-chief of the Army and Navy of the United States, and the militia of the several States when called into actual services of the United States.<sup>50</sup>

Implicit within these clauses is the basic idea that the President has the authority and duty to perform inherently governmental functions. Given the constitutional obligations of the President, the question then becomes how the President can obtain assistance in fulfilling his duties without violating the Constitution.

The founding fathers envisioned the President would need a great deal of help to exercise executive power. Consequently, the founding fathers drafted the Appointments clause, which has a mechanism for appointing senior

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<sup>49</sup> U.S. CONST. art. II, § 1, cl. 1.

<sup>50</sup> U.S. CONST. art. II, § 2, cl. 1.



officials as well as inferior officers. The Appointments clause states:

The President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme court and all other Officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of law or in the heads of departments.<sup>51</sup>

While it is not disputed that the founding fathers drafted the Appointments clause with the specific intent of providing a mechanism for appointing officials to assist in fulfilling executive duties, the text of this clause does not address the role of private actors. Was it the intent of the founding fathers that the President was to exercise significant government authority only through constitutional officers appointed according the mechanisms in the appointments clause? If so, the appointments clause could serve as a foundation stone for those challenging competitive sourcing of inherently governmental functions. If applicable, the appointments clause would also have impact within the government, limiting the exercise of significant government authority to those civil and

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<sup>51</sup> U.S. CONST. art. II, § 2, cl. 2.

military officers duly appointed via the appointments clause.

### **B. The DOJ Interprets the Appointments Clause**

Over the years, the Department of Justice (DOJ) has wrestled with this issue. In 1990, DOJ considered the constitutional limitations on employing private contractors to perform certain tasks then being performed by Department of Justice employees in the Office of Juvenile Justice and Delinquency Prevention and the Bureau of Justice Assistance.<sup>52</sup> DOJ argued that the appointments clause provided constitutional restrictions on delegating tasks to private contractors since the appointments clause limits the exercise of inherently governmental functions to officials appointed via the mechanisms of the Appointments clause.<sup>53</sup>

According to this view, to determine whether the appointments clause applied to any particular duty, one had only to ask whether the performance of that duty constituted the exercise of significant federal authority. If so, the Appointments clause kicked in. Since the

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<sup>52</sup> Constitutional Limits on "Contracting Out" Department of Justice Functions Under OMB Circular A-76, 14 Op. Off. Legal Counsel 94, 94 (1990).

<sup>53</sup> *Id.*

Appointments clause applies only to military or civil officers of the United States, the Appointments clause also required any person exercising significant federal authority to become an officer of the United States. That meant the person had to be an employee of the United States. As a result, the Appointments clause conceivably prohibited the competitive sourcing of inherently governmental functions to contractors since contractors are not employees of the federal government and not appointed via the Appointments clause.

This argument draws upon language in the Supreme Court case, *Buckley v. Valeo*, 424 U.S. 1, 46 L.Ed.2d 659 (1976), which is rather famous for its handling of other issues, wherein the Court defined the term officer. Among many other issues, the *Buckley* court was called upon to rule upon whether the assignment of officials to the Federal Election Commission who had not been nominated by the President and confirmed by the Senate via the Appointments clause violated the Appointments clause of the Constitution.<sup>54</sup> The *Buckley* court stated that the fair import of the Appointments clause is that any appointee exercising significant government authority pursuant to the laws of the United States is an officer of the United

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<sup>54</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976) (curiam).

States and must therefore be appointed in the manner prescribed by the Constitution.<sup>55</sup>

### **C. DOJ Disavows Its Previous Opinion**

In 1996, DOJ reconsidered and disavowed its 1990 opinion.<sup>56</sup> In a nutshell, DOJ argued that the Appointments clause simply does not apply to private actors.<sup>57</sup> In 1990, DOJ had defined an officer as any person exercising significant government authority. Under DOJ's revised view, the Appointments clause was not implicated unless the person is a government employee assigned to a position in the federal government.<sup>58</sup> Consequently, the act of exercising significant authority did not trigger the need to apply the mechanisms of the Appointments clause.

DOJ's revised opinion harkened back to an 1843 case, *United States v. Hartwell*,<sup>59</sup> which defined the term officer

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<sup>55</sup> *Id.* at 126.

<sup>56</sup> Walter Dellinger, Assistant Attorney General, Memorandum for the General Counsels of the Federal Government, *The Constitutional Separation of Powers Between the President and Congress*, (May 7, 1996) available at 1996 WL 876050. Available also at <http://www.usdoj.gov/olc/delly.htm>.

<sup>57</sup> *Id.* at 11.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 9 citing *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868).

to mean a person who holds an office. The *Hartwell* Court stated that an office:

is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were to be such as his superior in office should prescribe. A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the right and obligations of both parties, and neither may depart from them without the assent of the other.<sup>60</sup>

Applying *Hartwell* and its progeny,<sup>61</sup> DOJ argues that the Supreme Court has specified three criteria for identifying

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<sup>60</sup> *Id.* at 9.

<sup>61</sup> *Id.* at 10. DOJ refers to a later case. In *Auffmordt v. Hedden*, 137 U.S. 310 (1890), the Supreme Court once again addressed the question of when a person is a constitutional officer pursuant to the Appointments clause. In *Auffmordt*, an importer was dissatisfied with the federal government's valuation of dutiable goods since the appraisal was conducted jointly by a government employee and a merchant appraiser appointed by the collector of customs who was not an employee of the federal government. The plaintiff argued that he was entitled to a reappraisal since the Constitution required each of these "officials" to be duly appointed "officers" of the United States. The merchant appraiser clearly was not appointed under the Appointments clause. The Court rejected the argument that the merchant appraiser had to be appointed through the Appointments clause. The Court said the merchant appraiser was not an inferior officer, and consequently, did not have to be appointed through the Appointments clause. Applying the *Hartwell* elements, the court stated he had

no general functions, nor any employment which has any duration as to time, or which has no claim or right to be designated. His position is without tenure, duration, continuing emolument, or continuous duties. Therefore, he is not an officer.<sup>61</sup>

constitutional officers.<sup>62</sup> An officer is a person who is assigned to 1) a position of employment; 2) within the federal government; and 3) which carries significant federal authority. To bolster this view, DOJ cites Chief Justice Marshall who stated

[a]lthough an office is "an employment," it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer"<sup>63</sup>

Under this view, the provisions of the Appointments clause are not driven solely by the exercise of significant government authority.<sup>64</sup> To trigger the applicability of the Appointments clause, the federal government must also employ the person in a federal position, meaning the person must have duties which are "permanent, continuing, and based upon a chain of command rather than by contract."<sup>65</sup>

To sidestep the *Buckley* court, DOJ argues that the *Buckley* court's language defining an officer as a person who exercises significant authority is dicta. DOJ points

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<sup>62</sup> *Id.* at 9.

<sup>63</sup> *Id.* at 10, citing *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823).

<sup>64</sup> *Id.* at 11. DOJ points out that delegations of significant government authority to private individuals do not raise Appointments clause issues since the person is not employed permanently within the federal government to a position with emoluments and duties.

<sup>65</sup> *Id.* at 9.

out that the federal employment of the officers in *Buckley* was not an issue in *Buckley* since these officials were unquestionably employees of the federal government.<sup>66</sup> In addition, DOJ points out that the *Buckley* court cites *Germaine* and *Auffmordt* approvingly.<sup>67</sup> If the *Buckley* court had actually changed the definition of officer, the Court would have been overruling these prior two decisions.

#### **D. The Better View**

DOJ's current position regarding the Appointments clause is the better view. While the founding fathers sought to regulate the appointment of officers of the United States, *Germaine* and *Auffmordt*, which the *Buckley* court cited approvingly, do not support the proposition that an officer of the United States is defined solely as a person who exercises significant government authority.

While the *Buckley* court authored language contrary to prior case law, the circumstances of that case, which did not involve a non-federal actor, counsel against taking such a view. As a result, the appointments clause of the Constitution does not provide a persuasive basis for

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<sup>66</sup> *Id.* at 10.

<sup>67</sup> *Id.* at 10.

restricting private actors from exercising significant government authority.

## **V. The Federal Activities Inventory Reform (FAIR) Act**

### **A. Statutory Language**

With the constitution providing little support for the ban on competing inherently governmental functions, the analysis turns to Congressional acts. For those determining the legality of competitive sourcing of environmental functions, the Federal Activities Inventory Reform Act (FAIR) is of central importance. On Oct 1, 1998, the Federal Activities Inventory Act (FAIR Act)<sup>68</sup> went into effect, applying to the military departments including the Air Force. The FAIR Act provides a statutory definition of inherently governmental functions, meaning that Congress has wrested the definition of this concept, at least to some extent, from executive officials.

Drawing on OFFP Policy Letter 92-1<sup>69</sup> verbatim, Congress defined an inherently governmental function to mean

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<sup>68</sup> Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 31 U.S.C. § 501 Note (2002). 5 U.S.C. § 102 names the Air Force as a department covered by the FAIR Act.

<sup>69</sup> The most recent version of Circular A-76, promulgated on May 29, 2003 explicitly supersedes OFFP Policy Letter 92-1.



a function that is so intimately related to the public interest as to require performance by Federal Government employees.<sup>70</sup>

Congress further explained this general statement by borrowing language from OFFP Policy Letter 92-1:

(B) Functions included.—The term includes activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements. An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as—

(i) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

(ii) to determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

(iii) to significantly affect the life, liberty, or property of private persons;

(iv) to commission, appoint, direct, or control officers or employees of the United States; or

(v) to exert ultimate control over the acquisition, use or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control,

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<sup>70</sup> 31 U.S.C. 501 Note § 5(2)(A) (2002).

or disbursement of appropriated and other Federal funds.<sup>71</sup>

## **B. Legislative History**

In passing the FAIR Act in 1998, Congress did not intend to tinker with existing notions of what constituted an inherently governmental function. Senator Fred Thompson, from the Committee on Governmental Affairs, submitted a Senate report stating that the definition of inherently governmental functions used in the bill had not changed from how it was currently defined, as adopted by the Federal Acquisition Regulation (FAR).<sup>72</sup> He also stated that the FAR includes a nonexclusive list of examples of functions considered to be inherently governmental<sup>73</sup> and a

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<sup>71</sup> *Id.* at §5(B). The FAIR Act continues to define what is not included as an inherently governmental function.

(C) Functions excluded.— The term does not normally include —

(i) gathering information for or providing advice, opinions, recommendations or ideas to Federal Government officials or

(ii) any function that is primarily ministerial and internal in nature (such as building security, mail operations, operation of cafeterias, housekeeping, facilities operations and maintenance, warehouse operations, motor vehicle fleet management operations, or other routine electrical or mechanical services).

<sup>72</sup> S. REP. NO. 105-269, at 9 (1998).

<sup>73</sup> See FAR 7.503(c). These include (1) the conduct of criminal investigations, (2) the control of prosecutions and performance of adjudicatory functions other than those relating to arbitration or other methods of alternate dispute resolution, (3) the command of military forces, (4) the conduct of foreign relations and the determination of foreign policy, (5) the determination of agency policy, such as the determining the content and application of regulations, (6) the determination of federal program priorities for

nonexclusive list of examples of functions generally not considered to be inherently governmental functions.<sup>74</sup>

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budget requests, (7) the direction and control of federal employees, (8) the direction and control of intelligence and counter-intelligence operations, (9) the selection or non-selection of individuals for federal government employment, (10) the approval of position descriptions and performance standards for federal employees, (11) the determination of what government property is to be disposed of and on what terms, (12)(i) determining what supplies or services are to be acquired by the government, (12)(ii) participating as a voting member on any source selection board, (12)(iii) approving any contractual documents, (12)(iv) awarding contracts, (12)(v) administering contracts, (12)(vi) terminating contracts, (12)(vii) determining whether contract costs are reasonable, allocable and allowable, (12)(viii) participating as a voting member on performance evaluation boards, (13) approval of agency responses to Freedom of Information Act requests, (14) the conduct of administrative hearings to determine eligibility of any person for a security clearance or involving actions that affect matters of personal reputation or eligibility to participate in government programs, (15) the approval of federal licensing actions and inspections, (16) the determination of budget policy, guidance and strategy, (17) the collection, control, and disbursement of fees, royalties, duties, fines, taxes and other taxes unless authorized by statute, (18) the control of treasury accounts, (19) the administration of public trusts, (20) the drafting of Congressional testimony, responses to Congressional correspondence, or agency responses to audit reports from the Inspector General, the General Accountability Office or other Federal audit agency. OMB's revised Circular A-76, May 29, 2003 supersedes this list so it no longer provides authority for determining whether a function is inherently governmental.

<sup>74</sup> See FAR 7.503(d). These include (1) services that involve or relate to budget preparation, (2) services that involve or relate to reorganization or planning activities, (3) services that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy, (4) services that involve or relate to develop of regulations, (5) service that involve or relate to the evaluation of another contractor's performance, (6) services in support of acquisition planning, (7) contractors providing assistance in contract management, (8) contractors providing technical evaluation of contract proposals, (9) contractors providing assistance in the development of statements of work, (10) contractors providing support in preparing responses to Freedom of Information Act requests, (11) contractors working in any situation that permits or might permit them to gain access to confidential business information and/or any other sensitive information (other than situations covered by the National Industrial Security Program), (12) contractors providing information regarding agency policies or regulations, such as attending conferences on behalf of an agency, conducting community relations campaigns, or conducting agency training courses, (13) contractors participating in any situation where it might be assumed that are agency employees or representatives, (14) contractors

Senator Thompson stated it was the Committee's intent that both of these lists be included as part of the definition of inherently governmental functions in the implementing regulations of this Act.<sup>75</sup>

### **C. Reach of the FAIR Act**

While the FAIR Act provides some statutory backbone to the definition of inherently governmental functions, the drafters of FAIR Act limited its reach. The purpose of the FAIR Act is "to provide a process for identifying the functions of the Federal Government that are not inherently governmental functions, and for other purposes."<sup>76</sup> "Other purposes" are not defined. The FAIR Act requires the head of each executive agency to submit annually a list of activities performed by Federal Government sources for the executive agency that, in the judgment of the head of the

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participating as technical advisors to a source selection board or participating as voting or non-voting members of a source evaluation board, (15) contractors serving as arbitrators or providing alternative methods of dispute resolution, (16) contractors constructing buildings or structures intended to be secure from eavesdropping or other penetration by foreign governments, (17) contractors providing inspection services, (18) contractors providing legal advice and interpretations of regulations and statutes to government officials, and (19) contractors providing special non-law enforcement, security activities that do not directly involve criminal investigations. OMB's revised Circular A-76, May 29, 2003 supersedes this list so it no longer provides authority for determining whether a function is inherently governmental.

<sup>75</sup> *Id.*

<sup>76</sup> 31 USC § 501 Note (2002).

executive agency, are not inherently governmental functions.<sup>77</sup> The FAIR Act also outlines who and how one can appeal the inclusion of any activity of these lists to a federal agency.<sup>78</sup>

The FAIR Act itself does not order Federal agencies to outsource commercial activities. The FAIR Act is a process statute ordering federal agencies to identify and inventory commercial activities. Once these activities are identified, the FAIR Act instructs agency officials to use a competitive process to select a source for each activity only when the "head of the executive agency *considers* (emphasis added) contracting with a private sector source for the performance of such an activity."<sup>79</sup> The language mandating competitive sourcing does not appear.

Curiously, the FAIR Act also does not prohibit the competitive sourcing of inherently governmental activities. In fact, one will look in vain for any federal statute generally prohibiting the competing of inherently governmental functions.<sup>80</sup> While the FAIR Act provides a

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<sup>77</sup> *Id.* at § 2.

<sup>78</sup> *Id.* at § 3.

<sup>79</sup> *Id.* at § 2(d).

<sup>80</sup> See John Cibinic & Ralph C. Nash, *Contracting Out Procurement Functions: The "Inherently Governmental Function" Exception*, 14 Nash & Cibinic Report 45 (2000). 46, Mssrs. Cibinic and Nash found no general

definition for inherently governmental activities, the FAIR Act doesn't provide any statutory muscle for those looking to justify the ban on competitive sourcing of inherently governmental activities. The absence of such a provision reflects the focus of those drafting the FAIR Act, which was to provide a mechanism to pressure federal agencies into competing more of their functions. Passage of the FAIR Act represented a determined effort by several Republican Congressmen to promote the policy of using private firms to provide commercial services to the federal government. These Republican Congressmen had previously pushed a bill which they called "[t]he Freedom from Government Competition Act."<sup>81</sup> After intensive negotiations, the current FAIR Act, reflecting a compromise, emerged for passage.<sup>82</sup>

## **VI. The Revised OMB Circular A-76**

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statutory ban. They did find scattered provisions mandating that federal employees perform certain duties, i.e. 5 U.S.C. § 306(e) (drafting of strategic plans), 31 U.S.C. § 1115(e) (drafting of performance plans), 33 U.S.C. § 2321 (statutory prohibition against contracting out operation and maintenance of hydroelectric power generating facilities), 39 U.S.C. § 2805 (program performance reports).

<sup>81</sup> 144 CONG. REC. S9104 (1998) (statement of Rep. Thomas).

<sup>82</sup> *Id.* at 9105.

Circular A-76 restricts federal agencies from competing inherently governmental functions.<sup>83</sup> Consequently, before the Air Force can outsource any particular environmental function, Air Force officials must determine that the function is not inherently governmental, but rather commercial in nature.<sup>84</sup>

The current Circular A-76 maintains past policy which held that agencies shall "perform inherently governmental activities with government personnel."<sup>85</sup> The policy embodied in OMB Circular A-76, which is that the Federal government will refrain from competitive sourcing inherently governmental functions and rely as much as possible on the private sector for goods and services that are not inherently governmental, is more than 40-years old.<sup>86</sup> The

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<sup>83</sup> *Id.* at 1.

<sup>84</sup> Even if an activity is classified as commercial, a federal agency may exempt the activity from competitive sourcing. To do so, the agency must obtain a written determination from the competitive sourcing official (CSO) that the activity is not appropriate for private sector performance. See OMB Circular A-76, Appendix A-3. These activities are designated with a code, called Reason Code A.

<sup>85</sup> *Id.* at 1. Since OMB Circular A-76 was originally issued in 1966, the Circular has been revised four times, in 1967, 1979, 1983, and in May 2003. In 1979, OMB issued a handbook to accompany the Circular. In May 2003, OMB rescinded the handbook and incorporated its contents into the current Circular A-76. See OFFICE OF MANAGEMENT & BUDGET, CONDUCTING PUBLIC-PRIVATE COMPETITION IN A REASONED AND RESPONSIBLE MANNER 9 (2003).

<sup>86</sup> See Steven L. Schooner, *Competitive Sourcing Policy: More Sail Than Rudder?* 33 Public Contract Law Journal 263 (2004). At 274, Professor Schooner points out that a "deep chasm separates putative government policy not to compete with its citizens from a regime where the

Bureau of the Budget first promulgated this policy in its bulletins in 1955, 1957 and 1960. OMB Circular A-76 was issued in 1966 and revised in 1967, 1979 and 1983.<sup>87</sup>

The revised A-76 Circular<sup>88</sup> supersedes OFFP Letter 92-1, "Inherently Governmental Functions." Arguably, the revised circular also articulates a narrower definition for inherently governmental functions than previously promulgated.<sup>89</sup> In issuing the Revised A-76 Circular, OMB announced that the revised A-76 Circular offers a more concise definition of "inherently governmental functions and rescinds the more complex definition contained in OFFP Letter 92-1."<sup>90</sup> The stated purpose of the changed language was "to achieve greater consistency in the identification of inherently governmental positions."<sup>91</sup>

Currently, OMB's A-76 Circular defines an inherently governmental function as

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Government competes with its citizens when monetary savings might result."

<sup>87</sup> S. REP. NO. 105-269, 4 (1998).

<sup>88</sup> For authority, the Revised A-76 Circular cites to Reorganization Plan No.2 of 1970 (31 U.S.C. § 1111); Executive Order 11541; the Office of Federal Procurement Policy Act (41 U.S.C. § 405); and the Federal Activities Inventory Reform Act of 1998 (31 U.S.C. § 501 note).

<sup>89</sup> OMB Revised Circular A-76 (May 29, 2003) at 1.

<sup>90</sup> Performance of Commercial Activities, 67 Fed. Reg. 69,772 (2002).

<sup>91</sup> *Id.*



an activity that is so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements.<sup>92</sup>

Clarifying this general language, the OMB explains

An inherently governmental activity involves:

1. Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order or otherwise;
2. Determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
3. Significantly affecting the life, liberty, or property of private persons; or
4. Exerting ultimate control over the acquisition, use, or disposition of the United States property (real or personal, tangible or intangible), including establishing policies or procedures for the collection, control, or disbursement of appropriated and other federal funds.<sup>93</sup>

The Circular also cautions as follows:

[w]hile inherently governmental activities require the exercise of substantial discretion, not every exercise of discretion is evidence that

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<sup>92</sup> OMB Circular A-76 (Revised) (May 29, 2003) at Attachment A-2.

<sup>93</sup> *Id.*

an activity is inherently governmental. Rather, the use of discretion shall be deemed inherently governmental if it commits the government to a course of action when two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance that (1) identify specified ranges of acceptable decisions or conduct and (2) subject the discretionary authority to final approval or regular oversight by agency officials.<sup>94</sup>

The bare text of this definition provides little guidance.<sup>95</sup> The definition is vague and provides ammunition for just about anyone with an agenda.<sup>96</sup> For instance, how does one differentiate a function requiring discretion from one that requires substantial discretion? When is an activity so intimately related to the public interest as to mandate performance by government personnel?

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<sup>94</sup> OMB Circular A-76, (Revised) (May 29, 2003) at Attachment A-2.

<sup>95</sup> Dan Guttman, *Governance by Contract: Constitutional Visions; Time For Reflection and Choice*, 52 Admin. Law Rev. 859, 909 (2000). Mr. Guttman points out that "[w]hile the Executive, as discussed above, views the concept of 'inherently governmental functions' as axiomatic, the Supreme Court has not provided the concept with abundant content." Mr. Guttman points out that the Supreme Court has rarely delved into the concept. In one case, *In Flagg Brothers, Inc. v. Brook*, 436 U.S. 149 (1978), the court discussed the term "exclusive public functions." At 911, Mr. Guttman concludes that "*Flagg Brothers* means tough sledding for anyone who hopes to look to the Constitution and/or historic traditions to find an easy dividing line between governmental and non-governmental functions."

<sup>96</sup> See Steven L. Schooner, *Competitive Sourcing Policy: More Sail Than Rudder?* 33 Pub. Cont. Law J. 263 (2004). At 274, Professor Schooner criticizes the current distinction between "inherently governmental" and "commercial" activities. Professor Schooner states: "The 'inherently governmental' versus 'commercial' distinction today proves neither adequate nor realistic."

The guidance states that inherently governmental activity involves those activities "significantly affecting the life, liberty, or property of private persons." Given the public nature of most Air Force bases, does this provision imply that just about any environmental function is inherently governmental since just about any environmental function could significantly affect the health of base occupants? One could argue that just about any activity, i.e. food service preparation, has the potential for affecting "the life, liberty or property of private persons." Applied restrictively, this definition could mandate wholesale reorganization of the government. The language almost invites manipulation with some agencies outsourcing wholesale<sup>97</sup> while others characterize too many

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<sup>97</sup> Dan Guttman, *Governance by Contract: Constitutional Visions; Time For Reflection and Choice*, 52 Admin. L. Rev. 859, 879 (2000). Showing how far a federal agency has contracted out, Mr. Guttman points to the Department of Energy. Mr. Guttman states:

DOE relies on a private workforce to perform virtually all basic governmental functions. It relies on contractors in the preparation of its most important budget plans and policies, the development of budgets and budget documents, and the drafting of reports to Congress and congressional testimony. It relies on contractors to monitor arms control negotiations, help prepare decisions on the export of nuclear technology, and conduct hearings and initial appeals in challenges to security clearance disputes. In addition, a contractor workforce is relied on by the Inspector General. Citing to Use of Consultants and Contractors by the Environmental Protection Agency and the Department of Energy: Hearing Before the Subcommittee on Federal Services, Post Office, and Civil Service of the Senate Committee on Governmental Affairs, 101<sup>st</sup> Cong. 63 (1989).

positions as inherently governmental<sup>98</sup> or exempt activities from competition even though the agency has classified them as commercial.<sup>99</sup>

While the revised OMB definition of "inherently governmental functions" borrows much of its wording from the FAIR Act and cites the FAIR Act as authority for the Revised A-76 Circular, OMB added language to the definition of inherently governmental functions, which, arguably, greatly expands the range of activity open to the private sector.

The prior definition defined inherently governmental functions<sup>100</sup> as those requiring "the exercise of discretion

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<sup>98</sup> COMMERCIAL ACTIVITIES PANEL, IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT: FINAL REPORT 34 (2002) available at <http://www.gao.gov/a76panel/dcap0201.pdf>. At 14, the authors comment:

With the first implementation of the FAIR Act in 1999, several issues were raised. These issues included... .. concern that an unreasonably high number of activities were being exempted from competition or that inherently governmental activities were being included on the inventories.

<sup>99</sup> *Id.* The authors comment:

Guidelines implementing the FAIR Act outline a variety of reasons permitting agencies to exclude certain commercial activities from being considered eligible for competition; they may include such reasons as legislative exemptions, national security considerations, etc. Accordingly, the number of positions deemed eligible for competition may be much smaller than the overall inventory of commercial activities. For example, DOD reported that only 241,332 positions from its fiscal year 2001 inventory were considered eligible for competition.

<sup>100</sup> OMB's prior definition talks about "inherently governmental functions" while the new definition drops the last word "functions" in

in applying government authority or the making of value judgments in making decisions for the Government.”<sup>101</sup> In the new definition, OMB inserted the word “substantial” before the word “discretion.” Consequently, the new guidance states that inherently governmental activities include those which require “the exercise of *substantial* (emphasis added) discretion in applying government authority and/or in making decisions for the government.

When OMB published this new definition in the Federal Register, the change did not go unnoticed. OMB received comments asserting that the addition of the word “substantial” to the definition of inherently governmental constitutes a major shift.<sup>102</sup>

The OMB did not agree. According to Mr. Daniels, Director of OMB at the time,

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favor of the word “activities.” Consequently, we no longer have inherently governmental functions, instead we have inherently governmental activities. The change does not appear to have any significance.

<sup>101</sup> OFFP Policy Letter 92-1, Inherently Governmental Functions (September 23, 1992) at 2.

<sup>102</sup> See Comment #221, “Re: Federal Register Notice Announcing Proposed Revisions to OMB Circular A-76,” from Ms. Colleen Kelley, President, National Treasury Employees Union (NTEU), to Ms. Angela Styles, Administrator, Office of Federal Procurement Policy 3 (December 19, 2002). Writing on behalf of the NTEU’s 150,000 federal employees Union, Ms. Kelley argues that the revised A-76 Circular adopts a definition of inherently governmental function that is at odds with the current definition. “It would raise the bar on what functions can be classified as inherently governmental by requiring that such functions involve “substantial official discretion,” rather than the mere discretion required in the codified definition of the current version.” See [www.whitehouse.gov/omb/circulars/a076/comments/a76\\_list.html](http://www.whitehouse.gov/omb/circulars/a076/comments/a76_list.html).

[a]lthough the absence of the adjective "substantial" from the definition in the policy letter may have caused some confusion in the past, OMB does not believe the clarification to require the exercise of substantial discretion will unnecessarily restrict the definition of inherently governmental.<sup>103</sup>

Mr. Daniels points out that while the prior definition of inherently governmental did not include the term substantial, the explanation of exercise of discretion in prior guidance stated the following:

While inherently governmental functions necessarily involve the exercise of *substantial* (*italics added*) not every exercise of discretion is evidence that such a function is involved.<sup>104</sup>

OMB's position is that its revised definition of inherently governmental functions, even with the additional language, does not represent a shift in the meaning of the concept. Given the new language, this implies that OMB has always held a restrictive view of the definition of inherently governmental functions. Consequently, the effect of the new language is to close off an alternative interpretation of inherently governmental functions which is substantially broader. Under prior guidance, an inherently governmental function was defined as requiring a use of discretion which

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<sup>103</sup> OMB Circular A-76, *supra* note 2.

<sup>104</sup> OFFP Policy Letter 92-1, Inherently Governmental Functions (September 23, 1992) at 4.

has the effect of committing the Federal Government to a course of action when two or more alternative courses of action exist.<sup>105</sup> In the new policy guidance,

the use of discretion shall be deemed inherently governmental if it commits the government to a course of action when two or more alternative courses of action exist *and decision making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance that (1) identify specified ranges of acceptable decisions or conduct and (2) subject the discretionary authority to final authority or regular oversight by agency officials.*<sup>106</sup> (Italics added)

While the first clause of this new guidance echoes previous guidance, the language in italics is new. The introduction of such language as "acceptable ranges" shows that OMB regards the traditional language of inherently governmental functions as inappropriately restrictive. Others would argue that OMB has simply changed the definition of inherently governmental functions by adding language which did not appear in the definition of inherently governmental functions in the FAIR Act or in prior A-76 Circulars. The new guidance envisions agency officials turning over substantial discretionary authority to private firms so long as the agency provides written

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<sup>105</sup> *Id.*

<sup>106</sup> OMB Circular A-76, *supra* note 2 at Attachment A-2.

policy guidance covering ranges of acceptable decisions and regular oversight.

The use of the term "oversight" is also novel. Its significance is that it frees agency officials to outsource just about any activity so long as a agency officials provide some sort of oversight. While the definition of oversight is not clear, one could reasonably argue that it goes so far as reviewing decisions which have already been made and which the government may not be able to change. This is a big leap which offers the prospect of freeing government officials from day-to-day supervision of government programs.<sup>107</sup> Arguably, after the fact review of decisions of contractors by government officials crosses the line to inappropriately permit contractors to perform inherently governmental functions.

OMB's new definition of inherently governmental functions conspicuously drops one category of activity which OMB had previously identified as inherently governmental. Again, this change narrows the activities which are inherently governmental. Under the prior definition, an inherently governmental function includes activities involving interpretation and execution of the

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<sup>107</sup> If OMB's new guidance goes too far, the question arises as to whether anyone outside OMB can realistically challenge the change. I will address this issue later in this thesis.



law so as to "commission, appoint, direct, or control officers of employees of the United States."<sup>108</sup> Now, this specific prohibition is gone.

The narrowing of the definition of inherently governmental activities is also evident in the new definition's attempt to define inherently governmental activity involving the acquisition, use or disposition of United States property. The prior definition defines one type of inherently governmental activity as execution or interpretation of the laws of the United States such as to:

exert ultimate control over the acquisition, use or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal Funds."<sup>109</sup>

The new version of this sentence narrows the range of the inherently governmental activity. The relevant language states that inherently governmental activity involves:

the exerting of ultimate control over the acquisition, use, or disposition of United States property..., including *establishing policies or procedures* (italics added) for the collection, control, or disbursement of appropriated and other federal funds.<sup>110</sup>

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<sup>108</sup> OFFP Policy Letter 92-1, at 2.

<sup>109</sup> *Id.* at 2 at 5(e).

<sup>110</sup> OMB Circular No. A-76, *supra* note 2 at A-2.

By adding the words "establishing policies or procedures," OMB had dramatically narrowed the list of activities which are inherently governmental. The old definition implies that exerting ultimate control over use of United States property implies that government employees have to do the collecting, controlling or disbursing of appropriated and other Federal funds. The new definition implies that the government retains sufficient control by establishing policies or procedures for these areas. That's a big shift.

The revoked OFFP policy letter, 92-1, contained an illustrative list of functions OFFP considered inherently governmental.<sup>111</sup> One inherently governmental function included the determination of agency policy, such as determining the content and application of regulations, among other things.<sup>112</sup> This list doesn't appear in the Revised A-76 Circular, which revoked OFFP 92-1.

Conversely, OFFP 92-1 also contained an illustrative list of functions OFPP did not consider inherently

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<sup>111</sup> OFFP Policy Letter 92-1, Appendix A-9.

<sup>112</sup> *Id.* Appendix A-9, 6.

governmental.<sup>113</sup> Activities OMB did not consider inherently governmental include contractor's providing inspection services.<sup>114</sup> This list also does not appear in the revised A-76 Circular. OFFP 92-1 directed the Federal Acquisition Regulatory Council (FARC) to incorporate the policies of OFFP 92-1 in the Federal Acquisition Rules. The FARC has done so with OFFP 92-1 policies appearing at FAR 7.5<sup>115</sup>. These provisions have not been updated for the revised A-76 Circular.

The revised Circular's definition of inherently governmental functions sets the stage for significantly narrowing the definition of inherently governmental functions. Under the new definition, agencies can insulate decisions to outsource from attack by writing rules or procedures defining acceptable outcomes while providing regular oversight.

## **VII. Challenges To Competitive Sourcing**

### **A. Challenges to Competitions**

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<sup>113</sup> *Id.* at Appendix B-11.

<sup>114</sup> *Id.* at Appendix B-12, 17.

<sup>115</sup> See FAR Subpart 7.5, Inherently Governmental Functions. This subpart implements the policies of OFFP Policy Letter 92-1, Inherently Governmental Functions. FAC 90-37.

While one may argue that OMB has gone too far with its guidance regarding inherently governmental functions, the courts and GAO are still unlikely to step in to stop competitive sourcing of positions on the grounds that such positions are inherently governmental. For public employees, a major problem is standing.<sup>116</sup> On several occasions, public employees have sought to challenge the competitive sourcing of government positions via the A-76 process only to find GAO and the courts unwilling to grant standing to public employees challenging competitive sourcing conducted pursuant to OMB Circular A-76.<sup>117</sup> An exception to this has been a federal district court in Kentucky, which granted standing in an early case.<sup>118</sup> This

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<sup>116</sup> See Jennifer Ferragut and Charles Tiefer, *Letting Federal Unions Protest Improper Contracting Out*, 10 CORNELL J.L. & PUB. POL'Y 581 (2001).

<sup>117</sup> *Courtney v. Smith*, 297 F.3d 455 (6<sup>th</sup> Cir. 2002), *American Federation of Government Employees, AFL-CIO v. United States*, 258 F.3d 1294 (Fed. Cir. 2001); *United States v. Kenney*, 185 F.3d 1217 (11<sup>th</sup> Cir 1999); *National Federation of Federal Employees v. Cheney*, 883 F.2d 1038 (D.C. Cir. 1989); *American Federation of Government Employees AFL-CIO v. Babbitt*, 143 F.Supp. 2d 927 (S.D.Ohio 2001). For a spirited dissent from the view that government employees lack standing to challenge federal competitive sourcing actions, see Judge Mikva's spirited dissent in *National Federation of Federal Employees v. Cheney*, 803 F.2d 1038, 1059-60 (D.C. Cir. 1989). Judge Mikva argues that suits by public employees to compel government officials to award contracts appropriately furthers the purpose of the Budget and Economy Act, 31 U.S.C. § 101 et seq, whose purpose was to spur government officials to manage the government efficiently

<sup>118</sup> *Diebold v. United States*, Civ. C90-0001-L(A) (W.D. Ky. 1993). This case sparked hopes for federal unions, see Jayna Richardson, Comment, *Outsourcing & OMB Circular A-76: Sixth Circuit Opens the Door to Federal Employee Challenges of Agency Determinations*, 28 Pub. Cont. L.J. 203 (1999). See also *American Federation of Government Employees*,

9-year old, unpublished decision from a district court has limited significance. Since January 1, 2001, the sole federal court with jurisdiction to hear bid protests is the Court of Federal Claims.<sup>119</sup> Since the Federal Circuit Court of Appeals hears all appeals of bid protests from the Court of Federal Claims, the Federal Circuit's rulings are now controlling on this issue.

In 2001, in *American Federation of Government Employees, AFL-CIO v. United States*, the Federal Circuit Court of Appeals denied standing to federal employees challenging the propriety of a cost comparison analysis conducted by the Defense Logistics Agency (DLA).<sup>120</sup> The DLA had determined that it was cheaper to contract out the operation of three material distribution depots than to use federal employees.<sup>121</sup>

While affirming the decision of the Federal Court of Claims to deny standing, the Federal Circuit's standing

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*AFL-CIO v. United States*, 195 F.Supp. 2d 4 (D.D.C. 2002) where the court held that federal employees and their unions brought an action challenging the constitutionality of a statutory preference exempting firms under 51 percent Native American ownership from the requirement that the Air Force conduct a most efficient and cost-effective organization (MEO) analysis prior to contracting out work performed by more than 10 federal civilian employees.

<sup>119</sup> Pub. L. No. 104-320, § 12(d) (1996), 28 U.S.C. § 1491(b).

<sup>120</sup> *American Federation of Government Employees, AFL-CIO v. United States*, 258 F.3d 1294 (Fed. Cir. 2001) *cert. den.* 534 U.S. 1113 (2002).

<sup>121</sup> *Id.* at 1297.

analysis differed from the lower court's. The Federal Circuit ruled that the standing requirements under the Competition in Contracting Act (CICA)<sup>122</sup> applied to bid protests.<sup>123</sup> Under CICA, only an "interested party" has standing to file a bid protest. CICA defines an interested party as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract."<sup>124</sup> While the standing requirements of CICA, by its own terms, applied only to bid protests filed at the GAO, the Court grasped upon Congressional use of the term "interested party" in § 1491(b)(1), the statute defining federal court jurisdiction.<sup>125</sup> The Court reasoned that Congress intended the same standing requirements that apply to bid protests brought under the CICA to apply to actions brought in the Federal Court of Claims.

Consequently, the Court of Appeals for the Federal Circuit construed the term "interested party" in § 1491(b)(1) in accordance with CICA, and held that standing

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<sup>122</sup> 31 U.S.C. §§ 3551 *et seq* (2002).

<sup>123</sup> American Federation of Government Employees, AFL-CIO v. United States, 258 F.3d 1294, 1302 (Fed. Cir. 2001).

<sup>124</sup> 31 U.S.C. § 3551(2) (2002).

<sup>125</sup> § 1491(b)(1) was enacted as part of the Administrative Disputes Resolution Act of 1996, P.L. No. 104-320, 110 Stat. 3870 (1996).

in the Federal Court of Claims is "limited to actual or prospective bidders or offerors whose direct economic interest would be affected by the award of the contract or by failure to award the contract."<sup>126</sup> Applying this test to the petitioners, the court ruled that the petitioners were not offerors. Consequently, the court refused to grant standing.

GAO has also denied standing to federal employees challenging the propriety of agency competitions using the same reasoning.<sup>127</sup> This settled speculation that GAO might find standing under the terms of the newly revised A-76 circular.

Finally, the Commercial Activities Panel interjected one other problem public employees might face in challenging cost comparisons:

changing the standing rules alone may not permit federal employees to challenge cost comparisons in federal court because the employees' suit also would have to meet the constitutional requirement for a "case or controversy" between two adverse

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<sup>126</sup> *American Federation of Government Employees, AFL-CIO v. United States*, 258 F.3d 1294, 1302 (Fed. Cir. 2001) *cert. den.* 534 U.S. 1113 (2002).

<sup>127</sup> *Matter of Dan Duefrene et al*, Comp. Gen. Dec. B-293,883, B-293,887, B-293,908, B-293590.2, B-293590.3, 2004 CPD P 82, 2004 WL 836049 (April 19, 2004) (unpublished). See also, *Matter of: Vallie Bray*, B-293,840, B-293840.2, 2004 CPD P 52; *American Federation of Government Employees et al.*, B-282904.2, 2000 CPD ¶ 87; *American Federation of Government Employees*, B-223323, 86-1 CPD ¶ 572 (1986); *American Federation of Government Employees--Recon.*, B-219590.3, 86-1 CPD ¶ 436 (1986) (affirming an earlier dismissal).

parties. While the Panel did not explore this issue and expresses no view as to it, some have questioned whether the "case or controversy" requirement would be met.<sup>128</sup>

While the courts have been reluctant to grant standing to public employees, the courts will grant standing to contractors challenging A-76 competitions or decisions by federal agencies to move contracted operations in-house.<sup>129</sup> While this state of affairs provides little recourse for federal employees, the ability of contractors to get standing provides an avenue to get the issue of inherently governmental functions in front of a judge. In *CC Distributors v. United States*, the D.C. Circuit reversed and remanded a lower court decision denying standing to a contractor who desired to challenge an Air Force decision to operate civil engineer supply stores in-house instead of continuing to contract out such services.<sup>130</sup>

In this case, the Air Force had claimed that the operation of the civil engineer stores was an inherently

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<sup>128</sup> COMMERCIAL ACTIVITIES PANEL, IMPROVING THE SOURCING DECISIONS OF THE GOVERNMENT: FINAL REPORT 89 (2002) available at <http://www.gao.gov/a76panel/dcap0201.pdf>.

<sup>129</sup> See *LBM Inc.*, Comp. Gen. Dec. B-291775, 2003 CPD ¶ 50; In another case, the contractor hit pay dirt. See *Del-Jen, Inc.*, B-287273.2, 2002 CPD ¶ 27: GAO sustained the protest of the Department of the Air Force's decision to retain for in-house performance the civil engineering function at Hanscom Air Force Base, Massachusetts where the in-house cost estimate was \$72 million. Subsequently, Del-Jen, Inc. received the contract.

<sup>130</sup> *CC Distributors, Inc. v. United States*, 883 F.2d 146 (D.C. Cir 1989).



governmental function. While the court declined to address governmental function. While the court declined to address this question since it remanded the case, the court ruled that Department of Defense regulations defining inherently governmental functions provided reviewable standards.<sup>131</sup>

So far, the FAIR Act has also yielded no successful challenges to classification of activities as commercial or inherently governmental in the Courts or at GAO. An environmental advocacy group, Forest Service Employees for Environmental Ethics (FSEEE), however, has recently filed suit in U.S. District Court in Missoula, Montana, challenging Forest Service classifications of positions as inherently governmental or commercial on its FAIR Act inventories.<sup>132</sup> The environmental group has alleged that the Forest Service has classified nearly identical jobs as commercial at some locations, but inherently governmental at others.<sup>133</sup> The Forest Service counters that the

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<sup>131</sup> *Id.* The reviewable standard referred to is 32 C.F.R. § 169, DoD Directive 4100.15, Commercial Activities Program (1989). Unfortunately, the subsequent history shows no decision on the merits. It appears that the parties did not continue the dispute after the case was remanded.

<sup>132</sup> *But see* Amelia Gruber, *Environmental Group Challenges Forest Service Job Inventories*, May 14, 2004, at <http://www.gov.com/dailyfed/0504/051404a1.htm>.

<sup>133</sup> *Id.*

appropriate forum for employee appeals is with the agency, not U.S. District Court.<sup>134</sup>

### **B. Challenges to the FAIR Act**

Helpfully, for public employees, the 11<sup>th</sup> Circuit, in *CC Distributors v. United States*, in dicta, implied that public employees would not face a standing obstacle when filing a FAIR act challenge. The 11<sup>th</sup> Circuit explained that the FAIR Act allows public employee challenges to agency listings of activities as not inherently governmental, but not challenges to cost comparison disputes.<sup>135</sup> In this case, the 11<sup>th</sup> Circuit denied standing because the public employees were challenging the cost comparison process employed by the Air Force.

A victory under the FAIR Act, however, does not provide a basis for overturning an agency decision to outsource an inherently governmental activity. The FAIR Act has no provision for banning the competitive sourcing of inherently governmental functions. That ban is a provision of OMB Circular A-76. The courts, however, have been reluctant to find standing on the basis of a challenge to application of this circular. In addition, the *Courtney*

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<sup>134</sup> *Id.*

<sup>135</sup> *CC Distributors, Inc. v. United States*, 883 F.2d 146, 153 (D.C. Cir 1989).

court specifically stated that the provisions of OMB Circular A-76 (Revised) provide no basis for review since the circular is not a statute.<sup>136</sup>

Assuming that protestors could surmount standing problems, protestors will probably still face considerable difficulty challenging competitive sourcing decisions on grounds that the OMB Circular A-76 ban prohibits such competitive sourcing of inherently governmental functions. With OMB serving as the implementing agency for the Budget and Accounting Act of 1921<sup>137</sup> and the FAIR Act, the courts will most likely defer to OMB's interpretations of those statute's provisions by applying a *Chevron* type analysis to any challenges.

While challengers may argue that OMB's current A-76 substantially changes Congress' definition of inherently governmental, OMB will assert that its current guidance is simply consistent with the Congressional definition.<sup>138</sup>

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<sup>136</sup> *Id.* at 462. *But see* Diebold v. United States, 947 F.2d 787, 801 (6<sup>th</sup> Cir 1991) where the court ruled that OMB Circular is part of the law to apply under an Administrative Procedures Act challenge.

<sup>137</sup> The Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (1921) (codified as amended in scattered sections in 31 U.S.C.)

<sup>138</sup> In 1974, Congress created the Office of Federal Procurement Policy, part of the Office of Management and Budget (OMB), to establish a central body to provide overall direction of procurement policy for Federal executive agencies. OMB cites the Office of Federal Procurement Policy Act, 41 U.S.C. § 405 as one authority for promulgating Circular No. A-76 Revised, dated May 29, 2003.

Given the Chevron<sup>139</sup> type approach under the Administrative Procedures Act,<sup>140</sup> courts will be loathe to overturn OMB's interpretations.

Even if a court agrees with a challenger that OMB's definition of inherently governmental activities differs substantially from Congress', OMB can point out that the Congressional definition of inherently governmental functions is strictly limited to the purposes of the FAIR Act, which is simply to identify those activities which are not inherently governmental. The FAIR Act, itself, does not prohibit OMB from adopting a narrower definition of inherently governmental functions for other purposes. One of those other purposes could be competitive sourcing. The FAIR Act also doesn't compel OMB to retain inherently

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<sup>139</sup> In *Kelly v. E.P.A.*, 25 F.3d 1088, 1091 (D.C. Cir. 1994) the D.C. Circuit Court of Appeals wrote:

When Congress delegates all the adjudicatory functions under a statute to an administrative agency subject only to APA-like judicial review of the agency's decisions, it is presumed that Congress wishes the agency to enjoy a good deal of leeway to interpret statutory terms, either by regulation or through the adjudication itself. That presumption, articulated most notably in the famous case, *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), is based on the notion that Congress would wish an agency with political authority, rather than the judiciary, to exercise the policy choices implicit in statutory interpretation of ambiguous terms.

<sup>140</sup> See generally, Administrative Procedures Act, 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2002).

governmental functions in-house. That policy choice is left to the executive branch.

### **C. Legislative Proposals to Grant Standing**

Given the unwillingness of the courts or GAO to grant standing to public employees, political supporters of federal unions are seeking legislative changes. Sens. Susan Collins, R-Maine, and Carl Levin, D-Michigan, have sponsored legislation to grant federal workers the right to appeal the outcome of public-private job competitions to the General Accountability Office.<sup>141</sup> In addition, Sens. Edward Kennedy, D-Massachusetts, and Saxby Chambliss, R-Georgia, sponsored legislation which would make it easier for the military to shift work from contractors back to government employees. The Kennedy-Chambliss amendment instructs the Pentagon to let federal workers compete for new work as a matter of policy.<sup>142</sup> The bill also includes language giving in-house teams a 10 percent or \$10 million cost advantage in job competitions involving 10 or more

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<sup>141</sup> Jason Peckenpaugh, *Two Union-Backed Outsourcing Measures Added to Senate Bill*, June 15, 2000 at <http://govexec.com/daily/fed/0604/061504p1.htm>.

<sup>142</sup> *Id.*

federal jobs.<sup>143</sup> Added to the FY 2005 Defense authorization bill, the Senate approved both measures unanimously.<sup>144</sup>

The House of Representatives has passed a counterpart bill to the Kennedy-Chambliss amendment, which would require the Pentagon to let civil servants compete for a set percentage of jobs now filled by contractors.<sup>145</sup> The White House has already threatened to veto any FY 2005 Defense authorization bill if it contains a provision requiring the Pentagon to let federal employees compete for a percentage of jobs filled by contractors.<sup>146</sup>

## **VIII. The Discretionary Function Exception**

### **A. Supreme Court Cases**

Given the dearth of case law discussing the nature and contours of the concept of inherently governmental functions, those seeking to apply the concept to determine which environmental programs to compete will find little case law to guide them. The concept of inherently governmental functions has, however, arisen in the context of Federal Tort Claims Act (FTCA) litigation, providing

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Amelia Gruber, *Administration Decries "Insourcing" Measure*, May 21, 2004 at <http://govexec.com/dailyfed/0504/052104a1.htm>

healthy insight into how judges wrestle with the concept of governmental acts.<sup>147</sup> Specifically, the concept of governmental acts arises in FTCA litigation when the government raises the discretionary function exception (DFE) to bar federal government liability to allegations of negligence by the federal government.

In 1946, after many years of debate, Congress passed the Federal Tort Claims Act.<sup>148</sup> The purpose of the Federal Tort Claims Act was to provide a judicial remedy to persons injured by the tortious conduct of federal actors. In passing this law, Congress feared, however, that too broad a waiver of its sovereign immunity would subject decision-making of federal officials to paralyzing second guessing by judges.

The essential concern of Congress was not to exempt all decision-making of federal officials from suit, but only to protect those decisions by federal officials grounded in economic, social and political concerns. Consequently, Congress limited relief to ordinary common law torts grounded in state law while enacting a defense to

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<sup>147</sup> See generally, LESTER S. JAYSON & ROBERT C. LONGSTRETH, *HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES* § 12 (1964).

<sup>148</sup> 60 Stat. 843, 28 U.S.C. §§ 1346(b), 2671, *et seq.* [Title IV of Legislative Reorganization Act of 1946, 79<sup>th</sup> Cong., 2d Sess., Act of August 2, 1946, §§401-424].

claims challenging decisions susceptible to policy analysis.<sup>149</sup> The statutory exception is commonly known as the discretionary function exception (DFE). The statute states:

The provisions of this chapter and section 1346(b) of this title shall not apply to

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or a regulation, whether or not such statute or regulation be valid, or based on the performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.<sup>150</sup>

The discretionary function exception is of particular interest because the statutory language defining the exception tracks language Congress and OMB have also used to define an inherently governmental activity. Congress exempted tort claims from the application of the FTCA when the claims were "based on the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved was abused."<sup>151</sup> Meanwhile, the FAIR

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<sup>149</sup> *Dalehite v. United States*, 346 U.S. 15, 32 (1953).

<sup>150</sup> 28 U.S.C. 2680(a) (2002).

<sup>151</sup> *Id.*



Act defines an inherently governmental function to include activities that "require either the exercise of discretion in applying federal government authority or the making of value judgments in making decisions for the Federal government."<sup>152</sup>

How the courts have interpreted the DFE, while plainly dicta when applied outside the FTCA realm, provides insights into how the courts have distinguished between discretionary government activities from those which are not. Since skillful DOJ attorneys can characterize just about any government activity as discretionary, the courts have wrestled with distinguishing those activities which are grounded in government policy-making from those which are not.<sup>153</sup> This division of activities echoes the analysis federal officials must undertake to distinguish those activities which are inherently governmental from those which are commercial and subject to competitive sourcing.

The discretionary function exception has been a powerful tool for government attorneys seeking to ward off

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<sup>152</sup> 31 U.S.C. 501 Note § 5(2)(A) (2002).

<sup>153</sup> Jayson, *supra*, note 147, at 12.04[2]. In applying the FTCA exception, the courts have had difficulty defining the discretionary exclusion of the FTCA. No court has yet attempted a comprehensive definition of the phrase "discretionary function or duty." The Supreme Court has written that a definition may be impossible, *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984).

government liability in a range of cases with the courts broadly applying the concept of discretionary government acts grounded in policy-making. This view of discretionary government acts, if applied to ban on competitive sourcing of inherently governmental functions in the A-76, would provide significant support for those looking to keep numerous functions, especially management functions in-house. The courts, however, do not interpret the concept of discretionary government acts inflexibly. That is, government agencies, by giving explicit guidance can significantly reduce the discretion given to their contractors and thereby limit the range of activities which are discretionary government functions.

The first case the Supreme Court considered concerning the DFE was the famous *Dalehite*<sup>154</sup> case wherein the Supreme Court interpreted discretionary government acts broadly to disclaim government liability. *Dalehite* concerned claims arising from a disastrous explosion of ammonium nitrate fertilizer, which had been produced and distributed under the direction of the United States for export to devastated areas of Europe after World War II. After workmen loaded

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<sup>154</sup> *Dalehite v. United States*, 346 U.S. 15, 32 (1953).

the fertilizer onto a French ship, the fertilizer exploded. A Texas port was blown up and numerous persons died.<sup>155</sup>

Relatives filing suit alleged that government personnel had negligently administered the export program. As the Court noted:

Petitioners charged that the Federal Government had brought liability on itself for the catastrophe by using a material in fertilizer which had been used as an ingredient of explosives for so long that industry knowledge gave notice that other combinations of ammonium nitrate with other material might explode. The negligence charged was that the United States, without definitive investigation of FGAN properties, shipped or permitted shipment to a congested area without warning of the possibility of explosion under certain conditions.<sup>156</sup>

Rejecting petitioners' claims, the Supreme Court ruled that the government had engaged in authorized discretionary government activity. The Supreme Court explained that the DFE immunized the government or its employees from suit for discretionary acts arising out of government functions, even if those acts are negligent or wrongful. While finding it difficult to draw a clear line separating a discretionary act from one which is not discretionary, the Court explained:

It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the 'discretionary

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<sup>155</sup> *Id.* at 19-20.

<sup>156</sup> *Id.* at 23.

function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. *It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.* If it were not so, the protection of § 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion.<sup>157</sup> (Italics added)

*Dalehite's* lesson was that the Court interpreted discretionary government acts very broadly to protect government activity from suit. For years, Courts struggled to interpret *Dalehite* so that the FTCA remained a meaningful means of relief for injured parties. Later, the Supreme Court provided guidance restricting what the court viewed as discretionary government activity. This type of thinking if applied to the concept of inherently governmental functions would justify classifying a very broad range of activity as inherently governmental.

In *United States v. Varig*, the Supreme Court articulated that the status or rank of the government actor did not determine whether a specific government activity

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<sup>157</sup> *Id.* at 36.

was discretionary.<sup>158</sup> Consequently, even the lowest level federal employee could be performing inherently governmental functions. In this case, an owner of a commercial aircraft brought an action against the United States under the FTCA seeking damages for a destroyed aircraft and wrongful death arising from the plane crash.

The Supreme Court ruled that the discretionary function exception precluded tort actions based on the Federal Aviation Administration's alleged negligence in failing to check certain specific items in the course of certifying aircraft for use in commercial aviation. The Supreme Court stated:

First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case. As the Court pointed out in *Dalehite*, the exception covers "[n]ot only agencies of government ... but all employees exercising discretion." (citations omitted) Thus, the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee--whatever his or her rank--are of the nature and quality that Congress intended to shield from tort liability. Second, whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals.<sup>159</sup>

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<sup>158</sup> *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984).

<sup>159</sup> *Id.* at 813-814.

Following *Varig*, in *United States v. Gaubert*,<sup>160</sup> the Supreme Court refuted the idea that a discretionary function involves only policy decisions and did not reach to operational activities. Operational activities are a prime target for competitive sourcing. In *Gaubert*, a shareholder of an insolvent savings and loan association brought an action against the United States under the FTCA, alleging negligent supervision of senior management and negligent involvement in day-to-day operations by federal regulators.<sup>161</sup>

Pursuant to the Home Owners' Loan Act of 1933, the Federal Home Loan Bank Board (FHLBB) and the Federal Home Loan Bank-Dallas (FHLB-D) had undertaken to advise and oversee certain aspects of the management of a troubled bank, the Independent American Savings Association (IASA). After IASA's management resigned after prodding from FHLBB, FHLBB-D became involved in IASA day-to-day business, recommending a number of actions including recommending the hiring of a particular consultant, advising on bankruptcy matters, mediating salary disputes, reviewing the draft of a complaint for litigation, urging it to convert from state

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<sup>160</sup> *United States v. Gaubert* 499 U.S. 315 (1988).

<sup>161</sup> *Id.* at 318.

to federal charter and intervening when the state savings and loan attempted to install a supervisory agent at IASA. Despite these efforts, IASA soon revealed that it had a large negative net worth. As a result, a shareholder filed suit against the United States claiming that FHLBB and FHLB-D had been negligent in carrying out their supervisory duties.<sup>162</sup>

The Fifth Circuit Court of Appeals ruled for the plaintiff by rejecting the government's argument that the discretionary function exception applied to these government acts. The Fifth Circuit reasoned that discretionary actions govern only policy choices of government actors and do not reach to managerial or operational activities by government officials.<sup>163</sup>

The Supreme Court rejected this view. The Supreme Court held there is no dichotomy between discretionary functions and operational activities, holding that nothing in the nature of a discretionary act refers exclusively to policymaking or planning functions.<sup>164</sup> Day-to-day management of a bank involves making a range of decisions involving a wide array of choices. The Supreme Court ruled

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<sup>162</sup> *Id.* at 319-320.

<sup>163</sup> *Id.* at 321.

<sup>164</sup> *Id.* at 325.

that the exception protects not only policymaking, planning functions and the promulgation of regulations to carry out programs, but the exception also applies to protect actions of government agents involving an element of choice and grounded in the social, economic, or political goals of statutes or regulations.<sup>165</sup> The Court ruled that the Fifth Circuit erred when it held that the acts alleged in its complaint were not discretionary. They were discretionary since the relevant statutory provisions left such decisions to the agency's judgment and such decisions are presumed to have furthered the public policy objectives of the government to properly oversee the thrift industry.<sup>166</sup>

#### **B. Government v. Non-Governmental Discretion**

In *Sigman*,<sup>167</sup> the 9<sup>th</sup> Circuit handed down a decision with potentially important implications for distinguishing inherently governmental functions from those which are not. In a nutshell, the *Sigman* court considered the issue of governmental discretion vs. non-governmental discretion.

To say that any act which involves an element of choice is inherently governmental implies that just about

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<sup>165</sup> *Id.* at 332.

<sup>166</sup> *Id.* at 331.

<sup>167</sup> *Sigman v. United States*, 217 F.3d 785 (9<sup>th</sup> Cir. 2000).



any act is inherently governmental. For instance, take the example of driving a car. Driving a car involves making many judgments, i.e. what speed to drive, when to apply the breaks, how long to wait at an intersection. If the application of judgment during such activities barred the government from competing those activities, the government would find very little it could compete. The concept of discretionary governmental functions concerns activities which not only require judgment but also government policymaking.

*Sigman* involved tragic circumstances wherein Air Force doctors misdiagnosed the mental health condition of Mellberg, an airman, thereby releasing him from the hospital. As later events made clear, the airman was dangerously unstable. He subsequently returned to the mental health clinic to shoot 27 people including the doctors who had examined him. As a result of this tragedy, petitioners filed suit claiming the Air Force negligently handled the former serviceman's enlistment, his retention in the Air Force, and his discharge by failing to provide him serious medical or psychological treatment.<sup>168</sup>

The government filed for summary judgment citing the DFE. Among other rulings, the court held that the

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<sup>168</sup> *Id.* at 790-791.

exception did not bar claims based on failure of military medical personnel to diagnose, treat and control a former serviceman's mental condition.<sup>169</sup> The court rejected the government's argument that the DFE applied because Air Force physicians were carrying out an Air Force directive to determine Mellberg's fitness for duty, a duty the government's attorneys viewed as a discretionary act grounded in policy. If so, efforts to implement that directive would fall within the DFE.

The Court disagreed. The Court wrote:

The distinction we draw is not new, although this is the first case of which we are aware involving mental fitness examinations of members of the military. It exemplifies the distinction between the exercise of governmental discretion and non-governmental discretion.<sup>170</sup>

The Court then quoted from Professor Davis.

Professor Davis summarized it cogently: The discretionary function exception is limited to the exercise of governmental discretion and does not apply to the exercise of nongovernmental discretion such as professional or occupational discretion. The driver of a mail truck makes many discretionary decisions but they are not within the exception because they involve driving discretion, not governmental discretion. The physician at the veterans' hospital exercises professional discretion in deciding whether or not to operate; ... he combines professional discretion with governmental discretion when he

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<sup>169</sup> *Id.* at 795-796.

<sup>170</sup> *Id.* at 796.

decides that budgetary restrictions require nonuse of an especially expensive treatment in absence of specified conditions.<sup>171</sup>

The Court emphasized that claims arising out of the failure of Air Force physicians to diagnose Mellberg correctly did not involve competing policy considerations, the hallmark of the discretionary function protected by the FTCA. They involved duties performed by professionals inside and outside the military and they did not relate to any special functions reserved to governmental policy.<sup>172</sup>

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<sup>171</sup> *Id.* citing K. Davis, *Administrative Law Treatise* § 25.08 at 403-04 (Supp. 1982).

<sup>172</sup> *Id.* at 995-796, the court distinguished its ruling from cases where the courts did find that the government acts involved the exercise of discretion. The court said the government

relies on *Foster v. United States*, 923 F.2d 765 (9th Cir.1991), in which we held that the alleged negligence of an FAA physician in issuing a medical certificate for a commercial pilot, who later had a heart attack during flight, was within the discretionary function exception. *Foster*, and other cases upon which the government relies, however, involve the evaluation of individuals or programs for specialized governmental requirements, such as the FAA certification requirements at issue in *Foster*. See 14 C.F.R. §§ 61.3(c) *et seq.* Analogously, in *In re Consolidated U.S. Atmospheric Testing Litigation*, 820 F.2d 982, 993-95 (9th Cir.1987), we considered claims for radiation injuries resulting from the Department of Defense's atomic weapon testing program, and held they fell within the exception. In *General Dynamics Corp. v. United States*, 139 F.3d 1280 (9th Cir.1998), we dealt with prosecutorial discretion, an inherently governmental function. In this case, by contrast, the claim is for negligence in performing a function that is analogous to functions performed by professionals in the private sphere every day: the diagnosis and treatment of mentally ill individuals. The governmental discretion exception should not apply.

The exception was not meant to apply to functions which are analogous to functions performed by the private sector everyday.

The *Sigman* case has significant implications for the debate concerning what constitutes inherently governmental functions, especially in the Air Force environment. What the court made clear is that activity by a government actor will not make the activity inherently governmental when the petitioners can show that the activity is of a kind commonly carried out in the private sector and of the type governed by standards independent of particular government policy concerns. Here, the Court pointed out that medical practice is an activity commonly carried out by the private sector and governed by professional standards defining the appropriate standard of care in particular situations. In such a case, the activity, while requiring judgment, does not implicate government policy.

Applying this case to the competitive sourcing of environmental positions in the Air Force, one can see its implications. An activity requiring a high level of expertise in gathering and applying information to particular standards does not render that activity a

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discretionary government activity. Consequently, the *Sigman* case provides a good argument for relying on contractors to assess an environmental problem and apply a solution, provided the standards for choosing a particular solution are well established.

### **C. Environmental Applications**

The application of the DFE has also arisen specifically in the environmental context. In *Demery v. U.S. Department of the Interior*,<sup>173</sup> the court considered federal operation and maintenance of an aeration system to protect fish in a lake. Petitioner brought action against the United States Department of the Interior (DOI) under the FTCA for wrongful death of his wife who drowned allegedly as a result of negligence of Bureau of Indian Affairs (BIA) in failing to properly mark and warn of dangers posed by lake water that was prevented from freezing through use of aeration system.<sup>174</sup>

The Court ruled that decisions regarding maintenance of the aeration system, whether the agency would post warnings of open water, and the method and manner of those

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<sup>173</sup> *Demery v. U.S. Department of the Interior*, 357 F.3d 830 (8<sup>th</sup> Cir. 2004).

<sup>174</sup> *Id.* at 832.

warnings were discretionary. The Court ruled that the decision to maintain the aeration system was the type of judgment that the discretionary-function exception was designed to protect; and decisions regarding manner and method of warning of open water were types of judgments that the discretionary-function exception was also designed to protect.<sup>175</sup>

Given the court's willingness to find acts of the government as discretionary government acts, the case shows that even seemingly ministerial functions, such as maintaining an aeration system, often have inherently governmental implications. As a result, government decisions to outsource maintenance of various functions, while seemingly ministerial, frequently require government policymaking decisions. In *Demery*, the Court stated:

The BIA's maintenance of the aeration system clearly lends itself to policy analysis. The original decision to aerate the lake was made to promote Belcourt Lake's fish populations. This decision concerned protecting the environment and aquatic habitats, which are obvious issues of policy. The BIA's decisions about how it would go about aerating the lake and maintaining the open water were part of its original decision to aerate the lake. Mr. Demery has not and could not produce evidence that would take these decisions out of the realm of decisions that the discretionary function exception was designed to protect. The BIA is therefore immune from suit

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<sup>175</sup> *Id.* at 834.

for decisions regarding the BIA's maintenance of the aeration system.<sup>176</sup>

*OSI Inc. v. United States* is a hazardous materials dumping case.<sup>177</sup> Air Force bases generate a great deal of waste, whose disposal Air Force officials must arrange. The disposal of such waste is a prime area for possible competitive sourcing, wherein the Air Force can contract with private firms who will dispose of the waste. OSI, Inc. raises the question of whether the decision on where the private contractors dispose of the waste is a discretionary government act, requiring a government decision-maker.

OSI Inc. was the purchaser of property adjacent to Maxwell Air Force Base near Montgomery, Alabama. The soil and groundwater had been previously contaminated with hazardous substances from leaking Air Force landfills near their property. OSI filed suit under the FTCA claiming tortious injuries from contamination.<sup>178</sup>

The Court ruled that the DFE applied to bar the claim. The Court wrote:

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<sup>176</sup> *Id.* at 833.

<sup>177</sup> *OSI Inc. v. United States*, 285 F.3d 947 (11<sup>th</sup> Cir. 2002).

<sup>178</sup> *Id.* at 948.

Disposal of waste on a military base "involve[s] policy choices of the most basic kind." (citations omitted) The nature of the military's function requires that it be free to weigh environmental policies against security and military concerns. We hold that the decisions at issue here reflect the kind of judgment that the discretionary function exception is designed to shield. (citations omitted) Because the decisions involving the Air Force landfills are subject to the discretionary function exception, we affirm the district court's dismissal of the FTCA claims for lack of jurisdiction.<sup>179</sup>

In applying the DFE, the courts have often held that government response to hazards is almost always a discretionary activity. Responding to environmental emergencies and managing continuous environmental hazards is an important component of the environmental mission at any Air Force base.<sup>180</sup> The cases show that how the government responds to such hazards is almost always the type of activity falling within the parameters of the DFE.<sup>181</sup>

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<sup>179</sup> *Id.* at 953.

<sup>180</sup> In its 2003 Fair Act inventory, the Air Force reports no civilian positions in the environmental category of response to emergency mishaps. See the DOD Website FAIRNET <http://web.lmi.org/fairnet/select.cfm>) where the Department of Defense posts current year data.

<sup>181</sup> At 504, the *McKeel* Court, *McKeel v. United States*, 178 F.Supp.2d 493 (D. Md., 2001) makes the following observations:

Case law is replete with examples where governmental decisions concerning the proper response to hazards are protected from tort liability by the discretionary function exception. See e.g., *Lockett v. United States*, 938 F.2d 630, 639 (6th Cir.1991) (proper response to the discovery of PCBs in a residential area, including not making any response at all, is within the discretionary function exception to the FTCA); *Myslakowski v. United States*, 806 F.2d 94, 97 (6th Cir.1986), cert. denied, 480 U.S. 948, 107



*McKeel v. United States*, a PCB exposure case, is a good example of this approach.<sup>182</sup> In 1984, the Army began receiving complaints from employees regarding dust falling from air diffusers at the Army's Aberdeen research laboratory. While working at the site, a contractor's employee was exposed to dust which turned out to contain a PCB level of 50 parts per million. Later, this employee filed suit alleging that government officials negligently caused his exposure to harmful chemicals by failing to warn him of a potential hazard in the workplace. In ruling that the DFE applied to bar the claim, the Court stated that the government had complete discretion in choosing the manner to respond to the deteriorating insulation. The government response was simply to hire a contractor to handle the problem. The court also ruled that the decision to hire an independent contractor was protected since it was

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S.Ct. 1608, 94 L.Ed.2d 793 (1987) (decision whether to warn public that government jeeps for sale to the public might be susceptible to rollover is a discretionary function); *Childers v. United States*, 40 F.3d 973, 976 (9th Cir.1994), *cert. denied*, 514 U.S. 1095, 115 S.Ct. 1821, 131 L.Ed.2d 744 (1995) (decisions concerning the manner and types of warnings to be placed on hiking trails is a discretionary function barring suit); *Kiehn v. United States*, 984 F.2d 1100, 1106 (10th Cir.1993) (decision whether to warn of dangers of rock climbing a discretionary function); *Layton v. United States*, 984 F.2d 1496, 1502-03 (8th Cir.), *cert. denied*, 510 U.S. 877, (1993) (failure to warn tree-cutting contractor regarding hazards in cutting trees protected by discretionary function exception).

<sup>182</sup> *McKeel v. United States*, 178 F.Supp. 2d 493 (D. Md., 2001).

susceptible to policy analysis.<sup>183</sup>

In justifying its decision, the Court cited to a Fourth Circuit opinion:

In *Williams*, the Fourth Circuit reasoned that before deciding to engage a contractor the government has to weigh considerations such as expenses, payment, access to the premises, administration, and a "veritable plethora of factors." (citations omitted) Similarly, in the instant case, the government's decision to hire an independent contractor to remedy the problem of the deteriorating insulation falls within the discretionary function exception. Moreover, inherent in the government's decision to engage an independent contractor is the government's discretionary judgment that the insulation need not be tested for hazardous substances. Therefore, no genuine question remains as to whether the government's election not to test the insulation is of the type that normally involves considerations of policy.<sup>184</sup>

The Courts have applied similar reasoning to government run CERCLA cleanups, finding management decisions involved in a CERCLA cleanup constitute discretionary government acts. *United States v. Green*<sup>185</sup> centered upon a government attempt to recover monies expended by the government from a party under CERCLA responding to the release or threat of release of hazardous substances into the environment from a resin manufacturing

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<sup>183</sup> Of course, nobody brought up the question of whether clean-up of asbestos is an inherently governmental activity.

<sup>184</sup> *Id.* citing *Williams*, 50 F.3d 299, 310 (4<sup>th</sup> Cir. 1995).

<sup>185</sup> *United States v. Green*, 33 F. Supp. 2d 203 (W.D.N.Y. 1998).

plant owned by the defendant.

The defendant counterclaimed alleging damages from negligent management of the site by EPA contractors, serving as government agents. The defendants alleged that the government's actions at the site were wasteful or destructive. They also alleged that because EPA forbade their entry to the premises to make repairs or perform routine maintenance. As a result, containers containing hazardous substances deteriorated. Defendants also maintained that EPA ignored the fact that their company was a viable business which Green sought to reopen after completion.<sup>186</sup>

The court ruled that the government's actions, through its agents, fell squarely, within the DFE since the agents actions as cited by the defendants fell within the scope of employment of the government's agents.<sup>187</sup>

While the decisions of courts interpreting the discretionary function exception are dicta when applied in the competitive sourcing arena, the courts' discussion of discretionary government acts provide insight into the nature of the concept of inherently government functions. The willingness of the courts to find government actions

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<sup>186</sup> *Id.* at 209-210.

<sup>187</sup> *Id.* at 220-221.

discretionary, even in seemingly ministerial government operations provides support for those who argue for a fairly broad definition of inherently government functions.

#### **IX. The Sikes Act, Natural Resources Management<sup>188</sup>**

The Sikes Act<sup>189</sup> provides a separate statutory battleground over competitive sourcing of environmental positions. A donnybrook has broken out between Public - Employees for Environmental Responsibility, ("PEER") and the Air Force concerning whether the Sikes Act prohibits the competitive sourcing of natural resources management positions in the Department of Defense.<sup>190</sup>

In 1997, Congress amended the Sikes Act, which requires the Secretary of each military department to prepare and implement an integrated natural resources management plan ("INRMP") for each military installation.<sup>191</sup> Consistent with the use of military installations to ensure

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<sup>188</sup> See generally Major Teresa K. Hollingsworth, *The Sikes Act Improvement Act of 1997: Examining The Changes For The Department of Defense* 46 A.F.L.Rev. 109 (1999).

<sup>189</sup> 16 U.S.C. § 670a (2003).

<sup>190</sup> See *Public Employees For Environmental Responsibility v. United States Air Force*, Case No. CV 00-06133 filed in the United States District Court, Central District of California.

<sup>191</sup> Under 16 U.S.C. § 670a(2) of the Sikes Act, INRMPs are mandatory "unless the Secretary determines that the absence of significant natural resources on a particular installation makes preparation of such a plan inappropriate."

preparedness of the Armed Forces, the Sikes Act instructs the military Secretaries to carry out programs to provide for conservation and rehabilitation of natural resources on military bases subject to safety requirements, military security and public access to military installations.<sup>192</sup> Military secretaries are to employ sustainable multipurpose uses of resources, including hunting, fishing, trapping and non-consumptive uses.<sup>193</sup>

The DoD has taken the view that the Sikes' Act does not prohibit competitive sourcing of INRMP functions and has consequently used contractors in this area. As Rep. Young complains:

DOD has targeted over 2,800 "natural resource services" positions at 164 Army, Navy, and Marine Corps installations for cost comparison or direct conversion under the OMB Circular A-76, and many similar positions are under consideration within the Air Force.<sup>194</sup>

In a case of first impression, Public Employees for Environmental Responsibility ("PEER") has brought an action in Federal District Court in Central California challenging, among other things, that the Air Force has

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<sup>192</sup> 16 U.S.C. § 670a(a)(3) (2003).

<sup>193</sup> 16 U.S.C. § 670a(a)(3)(2003).

<sup>194</sup> Letter from Representative Don Young, U.S. House of Representatives to William S. Cohen, Secretary of Defense 12 ( July 17, 2000).

violated the Sikes Act by contracting out natural resource management positions at Edwards AFB.<sup>195</sup> Edwards AFB is a large Air Force Base consisting of approximately 301,000 acres which contain significant animal and plant habitat including endangered and threatened species.

PEER seeks an order directing the Air Force to hire additional professional natural resources management and law enforcement personnel to properly perform tasks necessary to carry out the Sikes Act and to prohibit defendants from contracting out any services related to natural resources management functions in any way.<sup>196</sup>

The courts have not yet interpreted the provisions of the Sikes Act.<sup>197</sup> The Sikes Act mandates that each INRMP include specific elements. These include fish and wildlife management, land management, forest management, and fish-and-wildlife recreation. IMRMPs must also address fish and

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<sup>195</sup> Plaintiff's Complaint at ¶¶ 14, 18, and 49, *Public Employees for Environmental Responsibility v. U.S. Air Force*, Civil No. CV 00-06133. In its complaint at ¶ 33, PEER states

two full-time employees at Edwards AFB are assigned exclusively to natural resource responsibilities. These two employees provide administrative oversight. An undetermined number of other Edwards AFB employees, with little or no natural resources training, devote some portion of their time to activities relating to natural resource management, constituting an estimated two fulltime equivalents.

<sup>196</sup> PEER v. Air Force, Complaint, at ¶¶ 64(d), (e) and (h).

<sup>197</sup> So far, the Judge has ruled on preliminary motions with the last ruling occurring on April 5, 2004.

wildlife habitat enhancement, wetland protection, enhancement and restoration where necessary, and integration of, and consistency among, the various activities under the plan. Lastly, INRMPs must establish specific natural resource management goals and objectives, provide for sustainable use by the public of natural resources, provide for public access to the military installation which is necessary and appropriate and enforce applicable natural resources laws.<sup>198</sup> These plans must be reviewed every five years.<sup>199</sup>

To develop, implement and manage these plans, Congress authored provisions addressing the types of personnel who will complete this work. Congress exempted natural resource management plans from the A-76 process, which provides for competing commercial services.<sup>200</sup>

Specifically, the Sykes Act provides:

With regard to the implementation and enforcement of integrated natural resources management plans agreed to under subsection (a) of this section—

(1) neither Office of Management and Budget Circular A-76 nor any successor thereto applies to the procurement of services that are necessary for that implementation and enforcement;

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<sup>198</sup> 16 U.S.C. § 670a(b) (2003).

<sup>199</sup> 16 U.S.C. § 670a(b)(2) (2003).

<sup>200</sup> 16 U.S.C. §670a(d)(1) (2003).

(2) priority shall be given to the entering into of contracts for the procurement of such implementation and enforcement services with the Federal and State agencies having responsibility for the conservation of fish or wildlife.<sup>201</sup>

Further Congress instructed:

To the extent practicable using available resources, the Secretary of each military department shall ensure that sufficient numbers of professionally trained natural resources management personnel and natural resources law enforcement personnel are available and assigned responsibility to perform tasks necessary to carry out this title, including the preparation and implementation of integrated natural resources management plans.<sup>202</sup>

This last provision replaced the following provision enacted in 1986:

Sec.2

(b)FISH AND WILDLIFE MANAGEMENT SERVICES. – The Secretary of each military department shall ensure, to the extent feasible, that the services necessary for the development, implementation, and enforcement of fish and wildlife management on each military reservation within the United States under the jurisdiction of the Secretary concerned are provided *by the Department of Defense personnel* who have professional training in those services.<sup>203</sup> (emphasis added)

The Congressional provision exempting these positions from the A-76 process is a far cry from a flat out

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<sup>201</sup> 16 U.S.C. § 670(a)(d)(2003).

<sup>202</sup> 16 U.S.C. § 670e-2 (2003).

<sup>203</sup> Act of October 27, 1986, Pub. L. No. 99-561, 100 Stat. 3149 (amending the Sikes Act).



prohibition on competing of these positions. If Congress had wanted to prohibit competing these positions, Congress could easily have said so just as Congress has done with respect to other functions, i.e. firefighting and security guards. Arguably, these provisions freed the military departments from the dictates of the A-76 process, granting the military departments more discretion to keep these services in-house but also failing to prohibit the military departments from competing many of these positions.

The provision directing military departments to give priority to federal and state wildlife agencies when contracting these services strengthens the argument that Congress authorized military departments to outsource these services since the language of this provision contemplates a contracting out process.

The legislative history also supports these arguments. Upon enacting the exemption from the A-76 process, Congress noted:

§ 2(a)(1) exempts activities and services associated with implementation and enforcement of cooperative fish and wildlife plans from provisions of Circular A-76 of the Office of Management and Budget or any successor circular. This is not intended to restrict the authority of the Department of Defense to enter into contracts for these services, but only to obviate the need for mandatory review and contracting under this Circular or any successor directive. In the event that the Department of Defense

elects to provide these services through contract, the U.S. Fish and Wildlife Service or the appropriate state fish and wildlife agency should receive priority consideration for award of these contracts. This reflects the view of the Committee that conservation of these resources is best accomplished by ensuring that activities relating to fish and wildlife are undertaken by individuals with professional competence in the management of these resources.<sup>204</sup>

In a preliminary motion for summary judgment, the District court judge opined that the Sikes Act contemplates the use of contractors. She ruled that

[t]he Sikes Act clearly appears to contemplate the use of some outside contractors, as it provides specifically that federal and state management agencies are to receive priority in connection with "the entering into of contracts for the procurement of ...implementation and enforcement services."<sup>205</sup>

With PEER failing to persuade the District Court judge that the Sikes Act precludes use of private contractors, the next question is whether the ban on competing inherently governmental functions applies to natural resources management positions. The current version of 16 USC §670(e-2) directs military departments to make available sufficient numbers of trained and professional natural resources personnel

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<sup>204</sup> H. R. REP. NO. 99-129(I), at 5259-60 (1985).

<sup>205</sup> Order Granting In Part and Denying In Part Defendants' Motion to Dismiss at 12, Public Employees For Environmental Responsibility ("PEER"), et al. v. U.S. Air Force, (No. CV 00-06133 MMM (RZx), December 21, 2000.

to implement and enforce Sikes Act programs. The command, however, doesn't specifically address whether Congress intended that making these personnel "available" means they must be federal civil servants.

Congress may have decided to leave this question to the discretion of the military departments because Congress had previously commanded military departments to use DoD employees in these positions. In the 1986 equivalent of 16 U.S.C § 670e-2, Congress had commanded the military departments to ensure, "to the extent feasible," that services necessary to perform Sikes Act programs "are provided by the Department of Defense personnel."<sup>206</sup> The legislative history of the 1986 Amendments shows that, at least in 1986, Congress wanted to keep natural resource management positions in-house.<sup>207</sup>

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<sup>206</sup> Act of October 27, 1986, Pub. L. No. 99-561, 100 Stat. 3149 (amending the Sikes Act).

<sup>207</sup> H. R. REP. NO.99-129(I), at 5258-59 (1985). Specifically, the House Report states:

Section 1 would also mandate that the development, implementation, and enforcement of fish and wildlife management activities on U.S. military reservations be provided by Department of Defense personnel with professional training in those activities. This provision is intended to insure that fish and wildlife management on military lands is recognized as a legitimate, in-house responsibility of the Department of Defense and that management activities in this regard are carried out by professional, fish-and-wildlife-management-trained personnel.

The 1997 provision drops the command to keep Sikes Act positions in-house.<sup>208</sup> The language "are provided by the Department of Defense personnel" mysteriously disappears. The 1997 provision certainly continues the mandate that the military Secretaries are to ensure the presence of sufficient numbers of professionally trained natural resources management and law enforcement personnel, but the provision no longer commands that such personnel must be employees of the Department of Defense. The new provision simply commands that the military Secretaries make such experts "available." The House Conference Report is also silent on the exact meaning of the change.<sup>209</sup> Consequently, it is not clear whether Congress intended a change.

While the text of the Sikes Act itself stays clear of using the concept "inherently governmental," the DoD has committed itself, through its regulatory actions, to the idea that Sikes Act positions are inherently governmental.<sup>210</sup> The relevant DoD regulation also instructs

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<sup>208</sup> Act of November 18, 1997, Pub. L. No. 105-85, 111 Stat. 2016.

<sup>209</sup> H.R. CONF. REP. 105-340 (1997).

<sup>210</sup> 32 C.F.R. § 190.4. 54 Fed.Reg. 7539, February 22, 1989, redesignated and amended at 56 Fed. Reg. 64481, December 10, 1991. The DoD has not reconsidered these provisions since enactment of the 1997 Sikes Amendments which dropped the previous command to use DoD employees at 16 U.S.C § 670e-2.

that the DoD commercial activities program<sup>211</sup> does not apply to the management, implementation, planning, or enforcement of DoD of natural resources programs.<sup>212</sup> Lastly, the regulation instructs the military services to maintain an organizational capability and program resources necessary to establish and maintain integrated natural resources management programs as prescribed and maintain at all levels of command the interdisciplinary natural resources expertise necessary to implement this program and provide for their continued professional training.<sup>213</sup>

The District Court Judge in California has ruled that this DoD regulation is binding law on the Air Force, providing reviewable standards.<sup>214</sup> She has also gone a step farther to state that C.F.R. § 190.4 prohibits the outsourcing of inherently governmental functions. The Judge writes:

As noted above, § 190.4 states the "the management, implementation, planning or enforcement of DoD natural resources programs" is an inherently governmental function that cannot be contracted out.

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<sup>211</sup> 32 C.F.R. Part 169 (2003).

<sup>212</sup> 32 C.F.R. § 190.4 (2003).

<sup>213</sup> 32 C.F.R. § 190.5 (2003).

<sup>214</sup> Order Granting In Part and Denying In Part Defendants' Motion to Dismiss at 8-9, Public Employees For Environmental Responsibility ("PEER"), et al. v. U.S. Air Force, (No. CV 00-06133 MMM (RZx), December 21, 2000.

While § 190.4 states that these programs are inherently governmental, § 190.4 does not state that DoD agencies cannot contract out inherently governmental functions. The judge is interpreting the regulation to have that meaning. The DoD source of authority for prohibiting outsourcing of inherently governmental positions is found at 32 C.F.R. 169.4(c). C.F.R. § 190.4, however, explicitly exempts DoD agencies from applying 32 C.F.R. Part 169 to Sikes Act positions. 32 C.F.R. Part 169 reflects DoD implementation of OMB's Revised Circular A-76. As stated previously, Congress specifically exempted natural resource positions from Circular A-76's provisions.

DoD's command to DoD agencies to retain an in-house organizational capability to maintain and implement INRMPs, however, is currently binding on the Air Force. Arguably, the 1997 Amendments to the Sikes Act no longer command the DoD to keep Sikes Act positions in-house. Currently, the DoD must simply make such expertise "available." Consequently, DoD probably has the discretion to change its regulations to eliminate its command to retain Sikes Act capabilities in-house. A change of this sort, however, might provoke howls from particular Congressmen.

## **X. National Environmental Policy Act**

While the National Environmental Policy Act (NEPA) does not explicitly refer to the concept of inherently governmental functions, NEPA imposes statutory duties on federal agencies to comply with its provisions. This statute raises the question as to whether a statutory duty imposed by Congress on a federal agency constitutes an inherently governmental function such that the federal agency cannot delegate the performance of that duty to contractors.

In 1969, Congress passed NEPA requiring federal agencies to fully explore the environmental impact of proposed federal actions. § 102(2) of NEPA contains "action forcing" provisions to make sure federal agencies comply.<sup>215</sup> At NEPA's heart is its requirement that a responsible federal official prepare a detailed statement, an environmental impact statement (EIS), for any major proposed action.<sup>216</sup> This detailed statement must show the environmental impact of the proposed action, any adverse environmental effects which cannot be avoided should the

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<sup>215</sup> 40 CFR 1500.1(a) (2003)

<sup>216</sup> Pub. L. 91-190, Sec 102, 83 Stat. 853 (1970), 42 U.S.C. § 4332(C) (1976). NEPA allows agencies to exempt types of activities from the NEPA process which normally have no significant environment impact. See 32 C.F.R. § 989.13 (2003) where the Air Force has published a list of these categorical exclusions.

proposal be implemented, alternatives, the relationship between local short term uses of man's environment and enhancement of long term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.<sup>217</sup>

As enacted, NEPA did not address whether federal agencies could "delegate" its statutory duty to prepare an EIS to another actor, for instance to a state agency or a contractor. Consequently, litigation erupted over this issue with litigants challenging federal agencies who had delegated the preparation of an EIS to state agencies or directly to contractors.

One line of cases involved situations where the federal agency had delegated preparation of the EIS to state agencies who often hired outside consultants. Confronted with the legality of this type of delegation, the federal Circuits split. Five Circuits found that delegating to a state agency was permissible as long as the federal agency did not abdicate a significant part of its responsibility by rubber stamping or adopting an unaltered or unreviewed EIS.<sup>218</sup> Adopting this view, the Fifth Circuit

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<sup>217</sup> NEPA 102(C), 42 USC § 4332 (2002).

<sup>218</sup> See *Movement Against Destruction v. Volpe*, 500 F.2d 29 (4th Cir. 1974) cert. den. 416 U.S. 936 (1974); *Finish Allatoona's Interstate Right, Inc. v. Brinegar*, 484 F.2d 638 (5th Cir. 1973).



declared that a responsible federal agency must independently perform its reviewing, analytical and judgmental functions and participate actively and significantly in the preparation and drafting process.<sup>219</sup>

In ruling that the federal agency met this standard, the court did not find the state's use of outside consultants inappropriate. The court pointed out that there was no NEPA prohibition against a private contractor providing the federal agency with data, information, reports, groundwork environmental studies or other assistance in preparing and EIS.<sup>220</sup>

The Second and Seventh Circuits came down hard on federal agencies delegating to state agencies, taking the position that NEPA required full and independent preparation of all EISs by the responsible federal agency when a state actor was involved.<sup>221</sup> In *Appalachian*, the court sided with the plaintiff to rebuke the federal

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<sup>219</sup> *Sierra Club v. Lynn* 502 F.2d 43 (5<sup>th</sup> Cir. 1974). See also *Greene County Planning Board v. FPC*, 455 F.2d 412 (2d Cir.) cert. denied, 409 U.S. 849 (1972).

<sup>220</sup> *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5<sup>th</sup> Cir. 1974).

<sup>221</sup> See *Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412 (2<sup>nd</sup> Cir. 1971); *Conservation Society of South Vermont v. Secretary of Transportation*, 508 F.2d 927 (2<sup>nd</sup> Cir. 1974, vacated and remanded for further consideration in light of Pub. L. 95-83, 423 U.S. 809 (1975) and reversed 531 F.2d 637 (2<sup>nd</sup> Cir. 1976); *Appalachian Mountain Club v. Brinegar*, 394 F. Supp. 105, 120 (D.N.H. 1975); *Swain v. Brinegar*, 517 F.2d 766 (7<sup>th</sup> Cir. 1975).

agency. In this case, the Federal Highway Works Agency (FHWA) had delegated preparation of an EIS to a state agency, whose officials prepared the EIS. Finding that the federal agency had not met its obligation to participate significantly in preparation of the EIS, the court pointed out that most if not all of the EIS was prepared by state officials and the lead federal official admitted that he did not discuss with state officials the scope of the EIS with regard to alternatives or possible extrinsic environmental effects. The Court found no evidence that FHWA had engaged in any independent analysis or evaluation of the project's environmental impact. As part of this, the court noted no evidence that FHWA "conceived, wrote, or even edited any section or passage in the EIS. At most these were informal chats touching on the subject."<sup>222</sup>

In 1975, the Second Circuit was confronted with a legal challenge to the legality of an EIS wherein the Navy had hired outside consultants to prepare it directly for the Navy. This was the same court which had, in recent years, issued opinions declaring preparation of EISs improper when federal agencies had delegated EIS preparation to non-federal actors, specifically to state

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<sup>222</sup> *Appalachian Mountain Club v. Brinegar*, 394 F.Supp. 105, D.C.N.H. 1975, March 25, 1975. page 120-121.

agencies.<sup>223</sup> The court distinguished between a federal agency hiring consultants to prepare an EIS from a federal agency delegating preparation of an EIS to a state agency.

The Court stated:

The evil sought to be avoided by the holdings in *Conservation Society* and *Greene County* is the preparation of the EIS by a party, usually a state agency, with an individual "axe to grind", i.e. an interest in seeing the project accepted and completed in a specific manner as proposed. Authorship by such a biased party might prevent the fair and impartial evaluation of a project envisioned by NEPA.<sup>224</sup>

In the case sub judice, the court found no problem of self-interest since the consultant had no interest to serve except the Navy's since the consultant was directly employed by the Navy and had no other interest in the outcome aside from its consulting duties. The Court even went so far as to state it saw

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<sup>223</sup> *Conservation Society of Southern Vermont Inc v. Secretary of Transportation*, 508 F.2d 927 (2<sup>nd</sup> Cir. 1974), rev'd 531 F.2d 637 (2<sup>nd</sup> Cir. 1986), and *Greene County Planning Board v. FPC*, 455 F.2d 412 (2<sup>nd</sup> Cir. 1971). In 1975, Congress stepped in and amended NEPA to allow EIS preparation by state agencies. Congress directed that an EIS prepared by a state agency will not be deemed insufficient solely by reason of having been prepared by a state agency or official so long as the responsible federal official furnishes guidance and participates in preparation of the EIS and independently evaluates the EIS prior to its approval and adoption and solicits the views of any other state or federal land management agency on the proposed action and its alternatives. Pub. L. 94-83, 89 Stat. 424 (1975) August 9, 1975. For cases applying this standard to federal agencies relying on state actors, see *Lesser v. U.S. Army Corps of Engineers*, 796 F.Supp. 180 (E.D.Pa. 1992). *Brandon v. Pierce*, 725 F.2d 555, (10<sup>th</sup> Cir 1984). *Center for Biological Diversity v. Federal Highway Admin.*, F. Supp. 2d 1175 (S.D.Cal. 2003).

<sup>224</sup> *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 87 (2<sup>nd</sup> Cir. 1975).

no difference between the Navy hiring a consultant to assist in the EIS process and preparation of the EIS by Navy personnel.<sup>225</sup> The Court's reasoning implied that it would be very difficult for a state agency to show it had no conflict of interest since a state agency always has an interest in whether a project is approved and in the way a project is carried out. In approving use of outside consultants, the Court did not address the extent to which the Navy could rely on these consultants.

In 1979, the Council of Environmental Quality (CEQ) issued guidelines concerning, among other things, the use of contractors. While these guidelines are not binding, courts have found them persuasive.<sup>226</sup> CEQ envisioned federal agencies hiring contractors to prepare environmental impact statements.<sup>227</sup> Further, CEQ addressed the extent to which federal agencies can rely on contractors to prepare EIS's by adopting language substantially similar to that language adopted in the Congressional amendment concerning use of state agencies to

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<sup>225</sup> *Id.*

<sup>226</sup> *Natural Resources Defense Council, Inc. v. Callaway*, 524, 532 F.2d 79 (2<sup>nd</sup> Cir. 1975). "Although the CEQ Guidelines are only advisory, since the CEQ has no authority to prescribe regulations governing compliance with NEPA, the Guidelines carry significant weight with this court."

<sup>227</sup> 40 CFR 1506.5 (2003).

prepare EISs. CEQ instructed that when an EIS was prepared by a contractor, the "responsible federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents."<sup>228</sup> This CEQ regulation did not define what it meant when it directed that federal agencies "participate in the preparation" of the EIS. Absent from this language is any command directing federal agencies to participate in actually drafting the EIS. Just as with the use of state agencies, the chief concern remains conflicts of interest. Consequently, the CEQ requires agencies to avoid conflicts of interests in choosing its consultants.<sup>229</sup> The Courts have upheld the use of contractors when the federal agencies have complied with these procedures.<sup>230</sup>

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<sup>228</sup> 40 CFR 1506.5(c)(2003).

<sup>229</sup> Daniel R. Mandelker, *NEPA Law and Litigation*, 2d § 7.5 (2003). Mr. Mandelker catalogues the cases as follows at § 7.5, footnote 13:

*Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002) (contractor not adequately supervised); *Associations Working for Aurora's Residential Envt. v. Colorado Dep't of Transp.*, 153 F.3d 1122 (10th Cir. 1998) (oversight sufficient); *Asphalt Roofing Mfrs. Ass'n v. Interstate Commerce Comm'n*, 567 F.2d 994 (D.C. Cir. 1977) (upholding use of contractor); *Valley Community Preservation Comm'n, Inc. v. Mineta*, 231 F. Supp.2d 23 (D.D.C. 2002) (same). See also *Bragg v. Robertson*, 54 F. Supp.2d 653 (S.D. W. Va. 1999) (approving agreement authorizing use of contractors); Guidance Regarding NEPA Regulations, Appendix at I-5, 8 Fed. Reg. 34,263, 34,265 (1982); § 7:3.

<sup>230</sup> Daniel R. Mandelker, *NEPA Law and Litigation*, 2d § 7.5 (2003).

## **XI. The Managerial/Ministerial Mix**

While ministerial duties dominate the day-to-day implementation of environmental programs, the courts discussion of discretionary government acts shows that the Air Force is unlikely to foresee every possible situation where the need for a discretionary governmental action will arise even in the most routine program. The current OMB definition for inherently governmental functions, helpfully, provides a how-to guide on how to outsource substantially more environmental positions. The first step is to separate, to the greatest extent possible, those tasks which are purely ministerial from those which involve the exercise of some sort of discretion or policy making. Many environmental tasks are purely ministerial and involve such tasks as picking up garbage, disbursing salt on icy roads, transporting hazardous waste, or running a base supply center. Even under the broadest definition of inherently governmental functions, purely ministerial tasks are not inherently governmental. By definition, these functions do not involve the exercise of discretion in applying government authority.

The next step is to identify those tasks which do involve the exercise of judgment. Broadly speaking, these

involve planning, advising, inspecting, information gathering, managing, conducting studies, drafting documents, creating and maintaining environmental records, preparing filings with local, state and federal agencies, interpreting rules and regulations, and contracting out specific jobs. Several of these functions are not controversial and are clearly not inherently governmental. Information gathering, of any sort, is not inherently governmental. Taking water samples, conducting an inventory of flora and fauna, monitoring pollution samples in air and water are information gathering activities and, consequently, not inherently governmental.

Relying on contractors to manage entire environmental programs will likely run afoul of the ban on competing inherently governmental functions at some point. These include, for instance, turning over the running of a emitting power plant to a contractor or the operation of a wastewater program to a contractor where a base has a NPDES permit. Management of such programs involves the exercise of substantial discretion and substantial interpretation of rules and regulations. This is where OMB's additional language to the definition of inherently governmental makes a big difference. Under the new definition, activities which involve substantial discretion are not necessarily

inherently governmental. Consequently, minor decisions involving day-to-day activities involving the exercise of some discretion are certainly allowable. Even when the activity involves substantial discretion, the agency can open that activity to contractors by establishing policy and guidance that identify acceptable ranges for decisions and by providing oversight. Consequently, this provision provides a mechanism for Air Force officials to turn over management of identified functions to contractors.

To secure the legality of this arrangement, the Air Force should also insert a government official in each of these programs for the purpose of making ultimate decisions for inherently governmental activities. With extensive guidance on air, water and hazardous waste provided by Congress, EPA, and the Air Force, the regulations provide helpful boundaries to limit the discretion of contractors. When gray areas arise, these contractors can and should consult government officials on these areas, giving government officials meaningful opportunity to make ultimate decisions. Given the courts' reluctance to grant standing to government workers protesting such arrangements, it is unlikely that such arrangements will come under meaningful attack.



## **XII. Competitive Sourcing: Environmental Lawyers**

While not part of Civil Engineering Squadrons, the Air Force employs over one hundred in-house attorneys, active duty<sup>231</sup> and civilian, whose duties entail rendering legal advice on environmental issues.<sup>232</sup> With the Air Force considering competing environmental functions, the question becomes whether the rendering of legal advice on environmental matters constitutes a "commercial" service subject to competitive sourcing.<sup>233</sup> The idea of private sector attorneys representing the federal government is not new. Just recently, the Justice Department famously employed David Boies to represent the United States as the United States pursued Microsoft in an antitrust case.

Under the FAIR Act, an inherently governmental function includes activities that require either the exercise of discretion in applying Federal Government

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<sup>231</sup> Active duty Air Force attorneys are assigned to the Judge Advocate General's Corps and are referred to unofficially as "JAGs."

<sup>232</sup> At its highest level, the Air Force employs close to two dozen active duty attorneys in JACE who specialize in rendering advice on environmental matters and assist the Department of Justice in preparing for environmental litigation involving the Air Force. The Air Force also employs additional environmental attorneys at just about every level of command, major command, numbered Air Force and base level office.

<sup>233</sup> In its 2002 Fair Act inventory, the Air Force reports 226 civilian positions under category Y415, Legal Services and Support. All of these positions are classified as commercial but the Air Force has exempted many of these positions from competitive sourcing anyway. These numbers do not include active duty attorneys and paralegals.

authority or the making of value judgments in making decisions for the Federal Government.<sup>234</sup> While Air Force environmental attorneys must exercise considerable judgment in rendering legal advice to commanders, Air Force attorneys do not function as commanders nor do they exercise final settlement authority when sued in federal court regarding environmental matters. Air Force attorneys give commanders critically important advice concerning commander's obligations and options but the commanders are responsible for making final decisions for environmental matters on their base. Consequently, it appears that the act of an Air Force attorney giving a commander advice doesn't amount to the "exercise of discretion in applying Federal Government authority." It is the relevant commander who exercises this discretion because it is the commander who is vested with federal government authority.

Likewise, when litigation erupts, Air Force attorneys actively investigate and prepare any necessary documents, but once any litigation moves to court, the Department of Justice assumes overall authority, including settlement authority, for the matter. Consequently, when involved in litigation, Air Force attorneys do not make ultimate decisions regarding the conduct of the litigation or

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<sup>234</sup> 31 U.S.C. § 501 note §5(B)(2002).

whether to settle. The FAIR Act provides support for this argument by directing that "providing advice, opinions, recommendations or ideas to Federal Government officials"<sup>235</sup> is a function not normally included in those considered inherently governmental. The current A-76 Circular definition of inherently governmental functions is even narrower than that posed by the FAIR Act. While the current A-76 circular specifically rescinded Policy Letter 92-1, which listed a number of functions, services and actions not considered inherently governmental, this list gave the green light for contractors' providing legal advice and interpretations of regulations and statutes to government officials.<sup>236</sup>

While the question of competing environmental attorneys will undoubtedly generate substantial debate, it appears that the prohibition on competing inherently governmental functions will not bar it in the environmental context.

### **XIII. Conclusions**

While many will debate the wisdom of competing environmental positions in the Air Force, current law

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<sup>235</sup> 31 U.S.C. § 501 note, § 5 (2003).

<sup>236</sup> OFFP Policy Letter 92-1, Appendix B at 16.

grants Air Force officials substantial discretion to outsource environmental positions. This argument proceeds from a review of the constitutional, statutory and executive restrictions on competitive sourcing.

While some have argued that the Appointments clause of the Constitution provides constitutional muscle to the ban on competing inherently governmental positions, the Supreme Court has interpreted the Constitution flexibly to allow non-federal actors to fulfill significant federal duties. While the Department of Justice once argued that the Appointments clause restricts the exercise of significant government authority to constitutionally appointed officers, the Department of Justice has now robustly repudiated this view. While the *Buckley* court provides language supporting the view that the Appointments clause restricts the exercise of significant government authority to federal employees, DOJ's argument that such language is dicta is the better view.

In 1998, for the first time, Congress took the initiative to provide a statutory definition of inherently governmental functions in the FAIR Act, wresting the articulation of the concept from the executive. While Congress provided a definition for inherently governmental functions, the definition Congress provided, however,

leaves room for all kinds of interpretation, leaving OMB the task of clarifying this definition to make it workable. As a result, OMB holds the key to defining the nature of inherently governmental activities. In addition, while Congress provided a definition of inherently governmental functions in the FAIR Act, Congress retained its practice of refusing to statutorily mandate that federal employees perform inherently governmental functions. Consequently, the authority for the current ban on competitive sourcing lies with OMB's Circular A-76, which OMB is free to revise. While unlikely, OMB could even drop its ban on competing inherently governmental functions. In May 2003, OMB took the lead, promulgating a revised Circular A-76, which arguably substantially narrows the list of activities considered inherently governmental.

Given the threat that competitive sourcing poses to federal employees, federal employees have sought to challenge competitive sourcing decisions at GAO and in the courts. At this time, however, GAO and the courts have not been receptive to these challenges, ruling that federal employees lack standing. While GAO and the courts have shut down federal employee challenges to competitions, the FAIR Act has the potential to provide federal employees with an avenue to challenge agency classification of

positions as commercial and subject to competitive sourcing. Ominously for federal employees, however, the FAIR Act provides only for in-house challenges for FAIR Act challenges. GAO and the courts have not yet addressed this issue.

Given the absence of guidance concerning the definition of inherently governmental functions, this thesis has explored an area of law which has addressed the concept of inherently governmental functions in the context of FTCA litigation concerning the discretionary function exception. While cases discussing the discretionary function exception show that judges have had great difficulty defining inherently governmental acts with precision, the cases also show that inherently governmental acts lurk in even seemingly ministerial programs. Consequently, the case law provides intellectual firepower for those within agencies who argue for an expansive definition of inherently governmental functions as applied to environmental programs.

In the environmental arena, the ban on competitive sourcing of inherently governmental functions arises when considering the provisions of the Sikes Act. While standing problems have shut down challenges to competitive sourcing decisions under Circular A-76, the Sikes Act

remains a viable but untested avenue for federal employees to attack competitive sourcing of environmental positions involving natural resource management.

While Congress did not explicitly address the concept of inherently governmental functions in the language of the National Environmental Policy Act (NEPA), the courts have addressed controversies concerning the extent to which federal agencies may "delegate" their NEPA responsibilities to non-federal actors including contractors. While the courts have approved substantial and wide ranging use of contractors to assist in the preparation of environmental impacts statements, the courts will not allow federal agencies to delegate their responsibilities entirely. Those agencies who "rubberstamp" EISs prepared by contractors run the risk that an angry judge will find a NEPA violation and issue an injunction preventing a project from progressing.

The analysis shows that inherently governmental functions inevitably arise in even seemingly ministerial environmental activities. As a consequence, the task of teasing out inherently governmental functions from those which are mundane in any particular environmental program may be a futile undertaking. Consequently, this thesis proposes a practical approach to satisfy the ban on

competing inherently governmental functions while leaving Air Force officials maximum flexibility to compete environmental positions. This practical approach emphasizes the retention of governmental officials to work alongside contractors in even seemingly routine environmental programs to ensure that Air Force officials appropriately perform inherently governmental functions as they inevitably and surprisingly arise in day-to-day operations.

While jobs of environmental lawyers in the Air Force have remained safe from the rigors of competitive sourcing, OMB's definition of inherently governmental functions raises the prospect that the Air Force could legally compete at least a portion of these positions to private sector law firms. Since commanders rather than lawyers are responsible for exercising governmental authority on environmental matters, lawyers serve as advisors. Advisory services rarely fall within those functions considered inherently governmental.

Given the state of constitutional law, the nature of Congressional action and court decisions ruling that federal employees do not have standing to challenge competitions, OMB stands as the key player regarding any forthcoming battles concerning whether particular



environmental functions are inherently governmental. Given OMB's revised Circular A-76 which contains "clarifying" guidance on inherently governmental functions, OMB has taken the lead to define the concept as narrowly as possible to free officials of federal agencies to compete as many environmental functions as their consciences will allow.

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